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# The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments

L. Harold Levinson

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## THE FLORIDA ADMINISTRATIVE PROCEDURE ACT: 1974 REVISION AND 1975 AMENDMENTS\*

L. HAROLD LEVINSON\*\*

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\* This article is an extension of the lecture delivered at the University of Miami School of Law on October 9, 1974, which inaugurated the Baron de Hirsch Meyer lecture series. The author joins in paying tribute to the late Baron de Hirsch Meyer, whose sustained interest and support played a crucial role in the development of the Miami law school.

This author gained additional insights into this area of law while participating in the Attorney General's conference on the new Administrative Procedure Act, which was held in Tallahassee on December 10, 1974. Selected presentations prepared for that conference have been published in a symposium in 3 F.S.U.L. REV. 64 (1975), including a presentation by this author in Levinson, *A Comparison of Florida Administrative Practice under the Old and the New Administrative Procedure Acts*, 3 F.S.U.L. REV. 72 (1975).

While retaining sole responsibility for this article, the author gratefully acknowledges research assistance rendered by Vanderbilt law students Richard P. Carmody, John M. Fite, Devo A. Heller, and Gregory A. Scott. Helpful comments on a draft of the article were received from Kenneth Oertel, Director of the Division of Administrative Hearings; C. McFerrin Smith III, Executive Director of the Florida Law Revision Council; and James D. Whisenand, Assistant Attorney General and Chief of the Administrative Law Section of the Department of Legal Affairs.

Portions of this article will be incorporated in the author's forthcoming FLORIDA ADMINISTRATIVE AND CONSTITUTIONAL LAW MANUAL to be published by D&S Publishers, Inc.

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## I. INTRODUCTION

A revised Florida Administrative Procedure Act was enacted in 1974<sup>1</sup> to replace the 1961 Act.<sup>2</sup> The 1974 Act was amended in 1975.<sup>3</sup>

1. Fla. Laws 1974, ch. 74-310, *repealing* FLA. STAT. ch. 120 (1973), *creating* FLA. STAT. ch. 120 (Supp. 1974) and FLA. STAT. § 11.60 (Supp. 1974) [hereinafter cited as 1974 APA].

The new Act is discussed in Alford, *Administrative Procedure Act*, 48 FLA. B.J. 683 (1974); Oertel, *Hearings under the New Administrative Procedure Act*, 49 FLA. B.J. 356 (1975); Whisenand, *Model Rules of Florida Administrative Practice—Chaos or Uniformity?*, 49 FLA. B.J. 361 (1975); Symposium, *The New Florida Administrative Procedure Act: Selected Presentations from the Attorney General's Conference*, 3 F.S.U.L. REV. 64 (1975).

2. FLA. STAT. ch. 120 (1973), *repealed* by Fla. Laws 1974, ch. 74-310 [hereinafter cited as 1961 APA]. Literature on the pre-1974 Administrative Procedure Act includes Evans, *Procedural Due Process: Florida's Uniform Administrative Procedure Act*, 21 U. MIAMI L. REV. 145 (1966); Hall & Canada, *Administrative Law*, in FLORIDA CIVIL PRACTICE AFTER TRIAL 1243 (1966) [hereinafter referred to as Hall & Canada].

3. Fla. Laws 1975, ch. 75-191, *amending* FLA. STAT. ch. 120 (Supp. 1974). In addition, Fla.

The 1975 amendments are reflected in this article, which uses the term "1974 Act" to mean the Act as amended in 1975, unless the context indicates otherwise. A number of other states have undertaken revisions of their APA's during recent years.<sup>4</sup> The new state APA's, including the 1974 Florida Act, point the way toward reform of the Revised Model State Administrative Procedure Act<sup>5</sup> and of the federal Administrative Procedure Act.<sup>6</sup>

This article discusses selected provisions of the new Florida Act, in comparison to prior Florida law, the Revised Model State Administrative Procedure Act, and the federal APA. A worthwhile future endeavor would compare a number of recent state APA's, many of which appear to have reached somewhat similar results to Florida's. However, the scope of the present article does not extend to other state statutes, except where specific provisions of another state were deliberately adopted by the draftsmen of the Florida Act. The concluding portion of this article summarizes the changes in Florida law brought

Laws 1975, ch. 75-107 enacted separately from the package of 1975 amendments to the APA, made a slight change to the portion of the APA dealing with publication of agency rules. See note 165 *infra*.

4. Administrative procedure act revisions have been enacted, to become effective in 1975, in Florida (see note 1 *supra*), Iowa (IOWA CODE ANN. ch. 17A (Supp. 1975)), North Carolina (N.C. GEN. STATS. ch. 150A (Supp. 1974)) and Tennessee (TENN. CODE ANN. §§ 4-507 to 4-527 (Supp. 1975)). New York's new Act will become effective September 1, 1976. Laws of N.Y., 1975, McKinney Session Law ch. 167 (APA).

Law Review articles on the new Iowa and North Carolina Acts are scheduled for publication at approximately the same time as the present article. See Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process*, Part I, 60 IOWA L. REV. 731 (1975); Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C.L. REV. 833 (1975).

A comprehensive listing of state administrative procedure acts and scholarly commentaries appears in W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 1160-63 (6th ed. 1974).

5. The Revised Model State Administrative Procedure Act [hereinafter cited as RMA] was promulgated in 1961 by the National Conference of Commissioners on Uniform State Laws. It has been published in 9C UNIFORM LAWS ANN. 136 (Supp. 1967, Edw. Thompson Co. ed.) and reproduced in many of the standard works on administrative law. The basic commentary is F. COOPER, *STATE ADMINISTRATIVE LAW* (1965). The RMA is critically reviewed in K. C. DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 1.04-1.0 (Supp. 1970). Other literature on the RMA includes: Bloomenthal, *The Revised Model State Administrative Procedure Act—Reform of Retrogression?*, 1963 DUKE L.J. 593; Dakin, *The Revised Model State Administrative Procedure Act—Critique and Commentary*, 25 LA. L. REV. 799 (1965); Merrill, *The Revised Model State Administrative Procedure Act*, 26 ALA. LAW. 375 (1965); *Symposium on the Model State Administrative Procedure Act*, 16 AD. L. REV. 50 (1963); Comment, *Administrative Procedure Legislation Among the States*, 49 CORNELL L.Q. 634 (1964).

6. 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 5362, 7521 (Supp. 1975) [hereinafter referred to as the federal APA]. Except for those sections dealing with freedom of information, which were significantly amended in 1967 and again in 1974, the Act has remained essentially unchanged since its enactment in 1946. Significant proposals for amending the federal APA were adopted in 1970 by the American Bar Association House of Delegates as set forth, with background and commentary, in *Symposium, ABA Proposals for Amendments to the Administrative Procedure Act*, 24 AD. L. REV. 371 (1972). A statement by the Administrative Conference of the United States on the ABA proposal is published at 25 AD. L. REV. 419 (1973). The ABA proposals and ACUS statement will be referred to throughout the present article for purposes of perspective on the new Florida APA. See notes 90 & 91 *infra*.

about by the new Act and the author's major criticisms and suggestions for further legislative action.

Before discussing the contents of the Act, a brief note should be made of its legislative history. The drafting of the new statute began in 1973, when the Florida Law Revision Council undertook to prepare a revision of the APA.<sup>7</sup> The Council retained Arthur J. England, Jr., as its reporter for this project.<sup>8</sup>

At an early stage of the project, the Council obtained invaluable assistance from Milton M. Carrow, executive director of the newly created Center for Administrative Justice of the American Bar Association. Mr. Carrow organized a weekend conference in Washington, attended by Mr. England, this author, and a number of distinguished administrative law scholars and practitioners from various parts of the country.<sup>9</sup>

This conference served a brainstorming function and produced preliminary sketches of provisions on many aspects of the topic. During the following few weeks, Mr. England prepared his first draft, followed by a series of revised drafts as the Law Revision Council considered the project at public hearings in various locations in Florida.

At the same time, parallel efforts were undertaken by the Government Operations Committee of the Florida House of Representatives.<sup>10</sup> The committee's staff distributed a questionnaire to all administrative agencies of the state and then compiled the responses, which provided essential information on current agency practices. The committee conducted its own hearings, and committee and staff members participated in the hearings of the Law Revision Council.

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7. Preliminary measures were started before the Law Revision Council undertook its project. In 1972, House Resolution 4031, in Fla. H.R.J. 1299 (1973), called for an analysis of the administrative procedures of the Public Service Commission and of the other agencies of the state. In 1973, the House Government Operations Committee sponsored House Bill 2145, a partial revision of the APA. The bill passed both houses, but was vetoed by Governor Askew on the ground that it unconstitutionally impinged upon the Governor's powers, specifically with regard to the suspension of public officers. In his July 5, 1973, veto message, Governor Askew noted that "the first priority of the Law Revision Council during the coming year will be a comprehensive review of the administrative procedure act." Fla. H.R.J. 1299 (1973).

8. Mr. England had recently returned to the practice of law in Miami after serving as the Governor's special counsel and consumer advisor. A few months after enactment of the 1974 revision of the APA, Mr. England was elected a Justice of the Supreme Court of Florida.

9. Participants in the Washington conference were: Milton M. Carrow, Director, Center for Administrative Justice; Professor Frederick Davis, University of Missouri Law School; Arthur J. England, Jr. Esq., Reporter, Florida Law Revision Council; Carroll L. Gilliam, Esq., Washington, D.C.; Joseph P. Griffin, Esq., Washington, D.C.; Cornelius B. Kennedy, Esq., Washington, D.C.; Professor L. Harold Levinson, University of Florida College of Law, and Chairman, Committee on APA Project, Florida Law Revision Council; Professor Hans Linde, University of Oregon Law School; and Professor Robert Park, George Washington University Law School. The conference is mentioned in Carrow, *Administrative Justice Comes of Age*, 60 A.B.A.J. 1396, 1399 (1974).

10. The chairman of the House Government Operations Committee was Representative Kenneth H. "Buddy" MacKay. The subcommittee on the APA was chaired by Representative Robert C. Hector.

By March 1974, the Law Revision Council and the House Government Operations Committee reached a substantial consensus on a draft of a revision of the 1961 APA. The leadership of the Senate had been kept informed, but no significant amount of Senate committee work had been undertaken at that time.

The House Government Operations Committee sponsored a bill, which quickly passed the House.<sup>11</sup> Shortly thereafter, the Senate passed a completely different bill,<sup>12</sup> based on a recommendation of the Senate Rules Committee and designed mainly to subject agency rulemaking to more stringent legislative control.

A conference committee reached agreement during the evening before adjournment of the legislative session, and the legislature enacted the conference bill on the final day of the session.<sup>13</sup> As enacted in 1974, the Act included most features of both the House and the Senate bills.

The 1975 amendments were drafted as the result of consultations between the Administrative Procedures Committee of the legislature and the House Government Operations Committee, with the benefit of comments from staff and other persons who had been affected by the 1974 revisions of the APA. The Law Revision Council did not participate in drafting the 1975 amendments.

## II. SELECTED PROVISIONS OF THE 1974 FLORIDA ADMINISTRATIVE PROCEDURE ACT AS AMENDED IN 1975

Most provisions of the new Act are discussed within the contents of this article; however, a few topics of relatively minor significance have been omitted as this article does not purport to include a comprehensive discussion of the entire Act.

### A. *Coverage and Exemptions*

The scope of coverage of Florida's APA has been significantly expanded by the 1974 version; in addition, the Governor and Cabinet have been authorized to confer selective exemptions from the provisions of the Act, subject to legislative review.<sup>14</sup>

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11. Committee Substitute for House Bills 2672, 2434 and 2583, in Fla. H.R.J. 352 (1974), as amended, on April 17, 1974.

12. Committee Substitute for Senate Bill 892, in Fla. S.J. 391 (1974), was passed, without amendment, on May 14, 1974. The Senate Bill was sponsored by the Committee on Rules and Calendar, chaired by Senator Dempsey Barron.

13. The conference bill differed significantly from the Senate Bill cited in note 12 *supra*, but was identically designated as Committee Substitute for Senate Bill 892. It passed both houses on May 31, 1974, *see* Fla. H.R.J. 1326 (1974) and Fla. S.J. 906 (1974), and was approved by Governor Askew on June 25, 1974.

14. *See* text accompanying notes 67-73 *infra*.

## 1. DEFINITION OF COVERED AGENCIES

## a. State agencies

The provisions of the 1974 APA, as under the 1961 Act, do not apply to the legislature or the courts.<sup>15</sup> The Governor, who was completely exempt under the 1961 APA,<sup>16</sup> is covered by the new Act, but only "in the exercise of all executive powers other than those derived from the constitution."<sup>17</sup> The Governor's constitutional powers are exempt from coverage because the separation of powers principle precludes legislative control.<sup>18</sup>

It seems highly appropriate that the Governor, by executive order, adopt APA-type procedures for the conduct of his constitutional powers, to the greatest extent feasible.<sup>19</sup> Many of the Governor's actions require the same type of openness, procedural regularity, and reasoned decisionmaking as that provided by the APA; examples include executive clemency and appointments to fill vacancies in office.<sup>20</sup> Other gubernatorial functions, however, may not lend themselves to APA-type procedures, such as the command of the militia<sup>21</sup> and the exercise of the veto power.<sup>22</sup> A study of the Governor's constitutional functions could usefully be undertaken to classify these functions into groups which could be subjected, by executive order, to all, part, or none of the APA-type provisions. Special attention should be given to the question of public access and publication<sup>23</sup> in order to determine, for example, whether executive orders should be routinely published in the Florida Administrative Code and its supplements.<sup>24</sup>

The new APA repeals the exemptions previously enjoyed by the military and by the Department of Revenue.<sup>25</sup> The Act's coverage now includes all state officers and agencies other than the legislature, the courts, and the Governor in the exercise of powers he derives from the

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15. 1974 APA § 120.50.

16. 1961 APA §§ 120.021(1), 120.21(1).

17. 1974 APA § 120.52(1) (a).

18. Governor Askew had cited the separation of powers principle as the basis for his veto of the attempted 1973 revision of the APA. See note 7 *supra*.

19. One commendable example of quasi-legislative action by the Governor was the executive order issued by Governor Askew, Exec. Order No. 71-40A (1971), noted in 46 FLA. B.J. 275 (1972), which created a system of judicial nominating commissions at a time when the constitution vested sole discretion in the Governor to fill vacancies in judicial office by appointment. The executive order required the Governor to make appointments only from lists of nominees submitted by the commission.

20. FLA. CONST. art. IV, §§ 8(a) (executive clemency), and 1(f), 7 (filling vacancies).

21. FLA. CONST. art. IV, §§ 1(a), 1(d).

22. FLA. CONST. art. III, § 8.

23. Under the existing system, the Governor's executive orders are available for public inspection in the office of the secretary of state, but are not included in any published compilation.

24. The Florida Administrative Code and Florida Administrative Weekly are discussed in text accompanying notes 164-73 *infra*.

25. 1974 APA § 129.52(1), *superseding* 1961 APA §§ 120.021(1), 120.21(1).



constitution. This range of coverage is comparable to that provided in the Revised Model State Administrative Procedure Act (RMA).<sup>26</sup> The new Florida Act goes even further, however, by extending coverage to the smallest organizational unit of each executive department. This matter had not been clarified in either the RMA or the 1961 Florida APA.

The new Act, like its predecessor, omits any mention that its provisions cover public corporations. A number of important functions are carried out, not only by statutory corporations,<sup>27</sup> but also by some non-profit corporations established for the purpose of performing public functions.<sup>28</sup> Arguably, public corporations could be regarded as "state agencies" subject to the Act. However, a more traditional interpretation would leave public corporations outside the coverage of the Act, even when performing functions similar to those carried out by administrative agencies. Thus, if the legislature transfers a function from an administrative agency to a public corporation, one result is likely to be the elimination of APA-type controls over that function.<sup>29</sup>

Further study could usefully be devoted to the functioning of public corporations, to the policy reasons for and against subjecting them to APA-type controls, and to the legality and feasibility of imposing such controls if they appear desirable.

#### b. Local government agencies

The new APA applies, not only to the state agencies previously discussed, but also to "[e]ach other unit of government in the state, including counties and municipalities to the extent they are expressly made subject to this act by general or special law or existing judicial decisions."<sup>30</sup>

26. RMA § 1(1).

27. Examples of statutory corporations and some of their attributes are discussed in O'Malley v. Florida Ins. Guar. Ass'n, 257 So. 2d 9 (Fla. 1971).

28. A recent example is Florida Legal Services, Inc., a non-profit corporation organized by The Florida Bar, in consultation with the Office of the Governor. The corporation has a 15-member board of directors, eight to be selected by the Board of Governors of The Florida Bar, and seven by the Governor of Florida. The corporation provides civil legal services to the poor. See Smith, *Development of Florida Legal Services, Inc.*, 48 FLA. B.J. 733, 734 (1974).

29. Even if the APA does not apply to public corporations, they must evidently still proceed with fundamental fairness, as a requirement of the due process clause of the Florida Constitution, whenever a public or "quasi-public" function is carried out, even by a non-governmental entity. See McCune v. Wilson, 237 So. 2d 169 (Fla. 1970).

30. 1974 APA § 120.52(1)(c). Evidently, the APA can apply only to *administrative* functions of local governmental units, not to legislative or judicial functions. This result derives from the APA provision cited in note 15 *supra*, which exempts the *state* legislature and courts from the Act, suggesting a policy of exempting legislative and judicial functions at the local government level also.

The distinction between a local government's legislative functions (exempt from the APA) and administrative functions (which may be covered by the APA) is not always clear, since a county commission or city commission may alternate between both functions. An example near the borderline between legislation and administration is the function conferred upon some county commissions of setting rates for utility companies. See, e.g., Florida Cities Water Co. v. Board of County Comm., 244 So. 2d 737 (Fla. 1971). If the legislature does address the general question of extending the APA to local governments, as suggested below, it should clarify the matter raised in this note, among other matters.

The punctuation of this provision is troublesome. If a comma had been inserted after the word "municipalities," the provision would be a reasonably clear expression of the intent of the Law Revision Council, as expressed in its Reporter's Comments to the similarly worded draft approved by the Council.<sup>31</sup> Under this interpretation, the Act would cover: (1) the state and (2) each other unit of government (including but not limited to counties and municipalities) to the extent they are made subject to the Act by general or special law, or by "existing" judicial decisions (that is, decisions rendered before enactment of the 1974 revision of the APA, which declared the 1961 APA applicable). The absence of a comma in the location indicated could lead to a different interpretation, to the effect that the Act covers: (1) the state; (2) counties and municipalities to the extent they are made subject to the Act by general or special law, or by "existing" judicial decisions; and (3) all units of government in the state other than the state, counties and municipalities, without the need for a law or judicial decision to make the Act applicable—this last category could include such units as school boards and tax adjustment boards, which arguably do not fall within the categories of state, county or municipal government. No indication can be found that the legislature intended this latter interpretation. This author prefers to view the statutory language as a carelessly punctuated attempt to carry out the intent of the Law Revision Council.

The 1961 Act did not mention local government as covered under the Act. Case law established that county school boards were regarded as state agencies and therefore were subject to the Act.<sup>32</sup>

The cases indicate that county commissions and other county agencies, although treated for some purposes like state agencies,<sup>33</sup> are not regarded as state agencies for purposes of applying the APA,<sup>34</sup> but

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31. "Local and regional government units of all types are brought under the act to the extent that the legislature chooses to do so . . . ." Reporter's Comments on Proposed Administrative Procedure Act for the State of Florida, submitted to Florida Law Revision Council, March 9, 1974, at 9 [hereinafter cited as Reporter's Comments]. These comments accompanied the Reporter's Draft of the proposed statute dated March 1, 1974. The comments were generally available to legislators and others during the following few weeks while the legislative process leading to the enactment of the APA took place. The comments are a significant source of legislative intent, especially for the numerous provisions of the Act which are identical or similar to the Reporter's Draft dated March 1, 1974.

32. *Canney v. Board of Pub. Instruction*, 222 So. 2d 803 (Fla. 1st Dist. 1969); *State ex rel. Allen v. Board of Pub. Instruction*, 214 So. 2d 7 (Fla. 4th Dist. 1968), *cert. discharged*, 219 So. 2d 430 (Fla. 1969).

33. Counties are political subdivisions of the state, FLA. CONST. art. VIII, § 1(a), and are regarded by the courts as possessing some of the attributes of the state, unlike municipalities. Thus counties, not municipalities, are immune from taxation. *Hillsborough County Aviation Authority v. Walden*, 210 So. 2d 193 (Fla. 1968); *Orlando Util. Comm. V. Milligan*, 229 So. 2d 262 (Fla. 4th Dist.), *cert. denied*, 237 So. 2d 539 (Fla. 1970). Similarly, counties, not municipalities, are immune from tort claims unless the state has waived immunity by general law. *Arnold v. Shumpert*, 217 So. 2d 116 (Fla. 1968); *Schmauss v. Snoll*, 245 So. 2d 112 (Fla. 3d Dist.), *cert. denied*, 248 So. 2d 172 (Fla. 1971).

34. *In Sweetwater Util. Corp. v. Hillsborough County*, 314 So. 2d 194 (Fla. 2d Dist. 1975),

instead are treated like municipal agencies and subjected to the APA only if another statute incorporates the APA by specific reference with regard to a designated type of function.<sup>35</sup> This case law is preserved by the 1974 APA, subject to legislative modification. As the APA applies to local governments to the extent they are expressly made subject to the Act by "existing" judicial decisions or other statute, the courts have been deprived of power to broaden the APA's applicability to local governmental units, unless constitutional grounds can be found to do so. The RMA does not cover local government, but the official comments suggest that subjecting local governments to APA provisions may be a desirable amendment.<sup>36</sup>

As a policy matter, APA-type procedures seem desirable, not only for the state agencies covered by the 1974 Act, but also for the many functions of agencies not presently covered, including the Governor in the exercise of some of his constitutional functions,<sup>37</sup> public corporations, and local governments in some of their functions. Especially noteworthy are the innovative provisions in the new Act for informal proceedings,<sup>38</sup> which could be particularly useful in many local governmental contexts. The 1974 Act cautiously refrains from expanding the scope of local government coverage, apparently because the sponsors of the legislation did not wish to undertake too many drastic reforms at one time. When some experience has been accumulated with the new Act, the time may be more propitious to consider extending its coverage, perhaps with adaptations, to local governments in general.

The need is likely to increase, as local governments create additional administrative agencies pursuant to their broad powers under the municipal and county home rule statutes.<sup>39</sup> Of course, the legislature which enacted home rule legislation retains authority to impose the procedures of the APA upon commissions created by local governments in the exercise of their statutory home rule powers.

## 2. DEFINITION OF COVERED FUNCTIONS

The 1974 Act defines several types of functions, which trigger the applicability of various provisions of the Act. The function most

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the court held that a Board of County Commissioners is not subject to the 1974 APA, in the absence of general or special legislation, since "there is no 'existing judicial decision' which would characterize a board of county commissioners as an agency for purposes of judicial review under the new Administrative Procedure Act." 314 So. 2d at 195.

35. *City of Opa Locka v. State ex rel. Tepper*, 257 So. 2d 100 (Fla. 3d Dist. 1972); *Arvida Corp. v. City of Sarasota*, 213 So. 2d 756 (Fla. 3d Dist. 1968).

36. It may also be desirable, at least in certain states, to add some of the city or county agencies. Where they have substantial powers over persons and property it is proper to expect them to be governed by the same procedural standards as those prescribed for statewide agencies.

RMA § 1(1), Comment.

37. See text accompanying notes 19-24 *supra*.

38. See text accompanying notes 279-88 *infra*.

39. FLA. STAT. ch. 166 (1973) (Municipal Home Rule Powers Act); FLA. STAT. ch. 125 (Supp. 1974) (county government).

broadly defined is "agency action," meaning "the whole or part of a rule or order, or the equivalent, or denial of a petition to adopt a rule or issue an order."<sup>40</sup> This term invokes the judicial review and enforcement sections of the Act.<sup>41</sup>

Two types of functions within this definition of agency action—rules and orders—are dealt with separately in other parts of the Act. For example, rulemaking is subject to its own distinctive requirements regarding notice, citizen petition and publication.<sup>42</sup> These same requirements do not apply to adjudication.<sup>43</sup> Still other parts of the Act cut across the definitions of rule and order. Thus, formal proceedings are required in some but not all rulemaking, and in some but not all adjudication.<sup>44</sup>

The definition of "rule" generally follows both the 1961 Act<sup>45</sup> and the RMA.<sup>46</sup> Under the new Act, a "rule" is an "agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes the amendment or repeal of a rule."<sup>47</sup> The term, however, does not include internal management memoranda, legal opinions by the attorney general or agency counsel prior to their use, agency budgets, collective bargaining provisions, or agricultural marketing orders.<sup>48</sup>

An "order" is defined as a

final agency decision which does not have the effect of a rule and which is not excepted from the definition of a rule, whether affirmative, negative, injunctive, or declaratory in form. An agency decision shall be final when reduced to writing.<sup>49</sup>

The 1961 APA contained a somewhat similar definition of "order."<sup>50</sup> However, the courts placed limitations on the term, by reading

40. 1974 APA § 120.52(2).

41. 1974 APA §§ 120.68(1) (on judicial review, *see* text accompanying notes 346-412 *infra*) and 120.69(1) (on enforcement, *see* text accompanying notes 413-22 *infra*).

42. *See* text accompanying notes 113-20 (notice), 137-39 (citizen petition) & 164-73 (publication) *infra*.

43. *See* text accompanying notes 113-20, 137-39, & 164-73 *infra*.

44. *See* text accompanying notes 231-32 & 244 *infra*.

45. 1961 APA § 120.021(2).

46. RMA § 120.021(2).

47. 1974 APA § 120.52(14).

48. *Id.* The complete text of the Act on this point is not completely free of ambiguity. It reads as follows:

The term [rule] does not include:

- (a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public,
- (b) Legal memoranda or opinions issued to an agency by the attorney general or agency legal opinions prior to their use in connection with the agency action, or
- (c) The preparation or modification of:
  - 1. Agency budgets,
  - 2. Contractual provisions reached as a result of collective bargaining, or
  - 3. Agricultural marketing orders under chapter 573 or chapter 601.

49. 1974 APA § 120.52(9).

50. 1961 APA § 120.21(3).

it in conjunction with another section of the statute; the courts held that the Act's provisions on adjudication were applicable only to any agency "authorized by law to adjudicate any party's legal rights, duties, privileges or immunities."<sup>51</sup> The courts concluded that agency action could not be considered an "order" under the 1961 APA unless it was an adjudication of rights, duties, privileges, or immunities as these terms had been judicially construed under pre-1961 case law. This line of reasoning led to the well-known decision rendered in 1969 by the District Court of Appeal, First District, in *Bay National Bank & Trust Co. v. Dickinson*,<sup>52</sup> subsequently cited with approval by the Florida Supreme Court.<sup>53</sup> *Bay National* held that the Comptroller did not adjudicate any party's rights, duties, privileges, or immunities when he exercised his statutory function of passing upon an application for a bank charter. The court therefore held that the Comptroller's decision was not an "order" subject to the APA, but was instead a "quasi-executive" function.<sup>54</sup>

The 1974 APA carefully avoids any mention of such terms as adjudication, rights, duties, privileges, or immunities. By deleting these terms from the statute, the draftsmen intended to render the *Bay National* holding under the 1961 Act inoperative.<sup>55</sup> The new Act covers all final agency actions.

In making this break with prior Florida law, the 1974 Act also moves beyond the RMA. The Revised Model Act applies to rulemaking and "contested cases"—the latter defined as proceedings "in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing."<sup>56</sup> Thus, the RMA requires the court to characterize the agency proceeding in terms of legal rights, duties, or privileges, while the new Florida APA has abandoned these categories.

Agency action within the meaning of the new Florida Act extends, in the opinion of this author, to such matters as, for example, prison discipline, parole release and revocation, and campus discipline.

The Florida Supreme Court recently cast considerable doubt on the extent to which the APA applies to workmen's compensation determinations. In *Scholastic Systems, Inc. v. LeLoup*,<sup>57</sup> the court characterized decisions by judges of industrial claims as "quasi-

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51. 1961 APA § 120.21(1).

52. 229 So. 2d 302 (Fla. 1st Dist. 1969).

53. *Dickinson v. Judges of the Dist. Court of Appeal*, 282 So. 2d 168 (Fla. 1973).

54. 229 So. 2d at 306.

55. [T]he discretionary determinations of many governmental agencies and officers which have been characterized as "quasi-judicial," "quasi-legislative" or "quasi-executive," or have otherwise been exempted from the operation of administrative procedure laws, are now brought under the minimum fairness provisions of the proposed act. To this extent the act is intended to overrule cases making the distinction, such as *Bay National Bank and Dickinson v. Judges of the District Court of Appeal* . . .

Reporter's Comments, *supra* note 31, at 18.

56. RMA § 1(2).

57. 307 So. 2d 166 (Fla. 1974). The case is noted at 29 U. MIAMI L. REV. 798 (1975).

judicial," not "administrative," and described the appellate review of such decisions by the Industrial Relations Commission as "judicial." This characterization was made in context of a holding that decisions of the commission are not "final agency action" subject to the judicial review provisions of the APA.<sup>58</sup> The court disclaimed any intent to comment on the applicability of other APA provisions to workmen's compensation matters.<sup>59</sup>

### 3. DEFINITION OF COVERED "PERSONS" AND "PARTIES"

The 1974 APA contains a series of innovative definitions of the term "party." Each definition of "party" includes, as one of its elements, the term "person," and this word is also defined in the Act.

"Person" is defined as any natural or artificial person, any unit of government in or outside the state, and any agency covered by the Act.<sup>60</sup> The prior Florida APA<sup>61</sup> contained no definition of "person," and the RMA's definition expressly excludes agencies from the definition.<sup>62</sup> The Reporter's Comments state two major reasons for authorizing one agency to participate as a "person" in the administrative activities of another: (1) to avoid costly litigation among agencies because policy has been formulated by one agency before another had an opportunity to participate and (2) to authorize local governments to participate in state-wide proceedings which will affect them.<sup>63</sup>

In the 1974 Act, "party" has a threefold definition: *first*, the specifically named persons whose substantial interests are being determined in the proceeding; *second*, any other person who as a matter of constitutional right, provision of statute, or provision of agency regulation is entitled to participate in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party; and *third*, any other person, including an agency staff member, allowed by the agency to intervene or participate as a party.<sup>64</sup>

The new definition of party, like the definitions of covered agency functions discussed previously, avoids using the terms adjudication, rights, duties, privileges, and immunities. If a person is required by the new Act to demonstrate his standing to become a party, the test is whether his substantial interests will be affected by the proposed agency action.

The new Act also recognizes a category of non-party participant,

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58. 1974 APA § 120.68(1). For a further discussion of this case, see text accompanying notes 356-67 *infra*.

59. 307 So. 2d at 170.

60. 1974 APA § 120.52(11).

61. Under the 1961 APA, person was not defined in either section 120.021 (definitions for the rulemaking sections), or section 120.21 (definitions for the adjudication sections).

62. RMA § 1(6).

63. Reporter's Comments, *supra* note 31, at 13.

64. 1974 APA § 120.52(10).

by providing that any agency may by rule authorize *limited* forms of participation in agency proceedings for persons who are not eligible to become parties.<sup>65</sup> An example appears later in the Act itself, with regard to formal adjudicatory proceedings: when appropriate in such proceedings, the general public, evidently as non-party participants,<sup>66</sup> may be given an opportunity to present oral or written communications.

#### 4. EXEMPTIONS

The 1974 APA contains a provision, without equivalent in either prior Florida law or the RMA, for conferring exemptions from APA coverage.<sup>67</sup> This mechanism was adapted from the Oregon APA,<sup>68</sup> under which favorable experience has been reported.<sup>69</sup>

The new Florida Act confers limited authority upon the Administration Commission (consisting of the Governor and Cabinet) to exempt any process or proceeding from one or more requirements of the Act,<sup>70</sup> upon application of an agency subject to the Act.

Only two grounds can justify the Commission's granting an exemption. First, an exemption is justified when the agency head has certified that the requirement of the Act would conflict with any federal law or rules with which the agency must comply in order to permit persons in the state to receive federal funds or tax benefits. Second, an exemption is justified when the Administration Commission finds that conformity with the Act would be

so inconvenient or impracticable as to defeat the purpose of the agency proceeding involved or the purpose of this act and would not be in the public interest in light of the nature of the intended action and the enabling act or other laws affecting the agency.<sup>71</sup>

Even if appropriate grounds exist, the Administration Commission may not confer an exemption "until it establishes alternative procedures to achieve the agency's purpose which shall be consistent, insofar as possible, with the intent and purpose of the act."<sup>72</sup>

Before conferring an exemption, the Administration Commission must receive an application from an agency and then hold a public hearing after giving the same type of notice required in rulemaking proceedings.<sup>73</sup>

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65. 1974 APA § 120.52(10) (c).

66. See text accompanying note 268 *infra*.

67. 1974 APA § 120.63.

68. ORE. REV. STAT. §§ 183.315(4), (5) (1973).

69. Letter from Professor Hans Linde, University of Oregon Law School, to Arthur J. England, Jr., Reporter to the Florida Law Revision Council, November 30, 1973 (enclosed with materials on the Oregon procedure for exempting agencies from their APA).

70. 1974 APA § 120.63(1).

71. *Id.*

72. 1974 APA § 120.63(2).

73. For the type of notice required for rulemaking under section 120.54(1), see text accompanying notes 113-20 *infra*.

An exemption and any alternative procedure prescribed shall terminate ninety days after final adjournment of the next regular legislative session after issuance of the exemption. This exemption shall be renewable, upon the same or similar facts, only once, and the renewal shall terminate ninety days after final adjournment of the next regular legislative session following the renewal.

#### 5. RELATIONSHIP BETWEEN COVERAGE, EXEMPTIONS AND THE INFORMAL PROCEEDING

The broad definition of covered agencies, functions, persons and parties in the new Act is feasible for two reasons. First, the Act introduces the selective exemption mechanism discussed above. Second, the Act introduces the informal proceeding for some types of determinations, while requiring the formal proceeding for others, on the basis of criteria discussed later.<sup>74</sup> The 1961 Florida Act and the RMA provide only one type of adjudicatory proceeding—the formal hearing. But formal proceedings could not be made feasibly available for the wide range of agency actions covered by the new Florida Act. *Bay National Bank & Trust Co. v. Dickinson*<sup>75</sup> may therefore be viewed as a judicial attempt to protect the agencies against a flood of demands for formal hearings. Now that selective exemptions and informal proceedings are available, the agencies have received their protection from the legislature and no longer need the type of protection which *Bay National* had offered under the 1961 Act.

#### B. Procedural Rules (Including Model Rules of Procedure)

The new APA requires each agency to adopt procedural rules. In addition, the Administration Commission is required to file model rules which shall become the procedural rules of each agency except in limited circumstances.

#### 1. REQUIREMENT THAT EACH AGENCY ADOPT PROCEDURAL RULES

The 1961 APA required each agency to adopt "appropriate rules of procedure for notice and hearing."<sup>76</sup> The 1974 Act goes into more detail, requiring each agency to adopt rules of practice and procedure and rules describing the agency's organization and its method of scheduling proceedings and distributing agendas.<sup>77</sup> The new requirement corresponds closely to the RMA<sup>78</sup> and the federal APA.<sup>79</sup>

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74. See text accompanying notes 231, 241, 244, & 279 *infra*.

75. 229 So. 2d 302 (Fla. 1st Dist. 1969). See text accompanying notes 52-54 *supra*.

76. 1961 APA § 120.23.

77. 1974 APA § 120.53(1). The 1975 amendments add a new sentence, as follows: "Agenda for special meetings of district school boards under authority of § 230.16 shall be prepared upon the calling of the meeting, but not less than 48 hours prior to such meeting."

78. RMA § 2(a).

79. 5 U.S.C. § 552(a) (1) (1970).



## 2. MODEL RULES

The new Act adopts a provision of the Oregon APA<sup>80</sup> regarding model rules, a matter not included either in the RMA, the federal APA, or the 1961 APA.

The Act requires the Administration Commission to promulgate one or more sets of model rules of procedure.<sup>81</sup> Upon the filing of these rules with the Department of State, they shall be the rules of procedure for each agency subject to the Act, to the extent that the agency has not adopted a specific rule of procedure covering the subject-matter contained in the applicable model rule. An agency may seek modification of the model rules to the extent necessary to conform to any requirement imposed as a condition precedent to the receipt of federal funds, or to permit persons in the state to receive tax benefits under federal law, or to operate the agency most efficiently as determined by the Administration Commission. However, the agency rules must be in substantial compliance with the model rules.<sup>82</sup> The reasons for any modification shall be published in the Florida Administrative Weekly.

This provision dealing with model rules is vague in two respects. First, it does not state whether the Administration Commission can amend the model rules, as applicable to a specific agency, without the concurrence of the affected agency itself. This leads to the related question whether the Administration Commission may amend the model rules, as applicable generally to all agencies, without the concurrence of all affected agencies. Policy arguments exist both for and against recognizing that the Administration Commission has the implied power to make specific or general amendments to the model rules without the concurrence of the affected agencies. Legislative clarification would be appropriate on this point.<sup>83</sup>

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80. ORE. REV. STAT. § 183.340 (1973). The effect of this section is discussed in Hazard, *The Oregon Administrative Procedure Act: Status and Prospects*, 39 ORE. L. REV. 97, 103-05 (1960).

81. 1974 APA § 120.54(9). See generally Whisenand, *Model Rules of Florida Administrative Practice—Chaos or Uniformity?*, 49 FLA. B.J. 361 (1975).

82. The requirement of substantial compliance was added by the 1975 amendments, with the following language: "Agency rules adopted to comply with §§ 120.53 and 120.565 must be in substantial compliance with the model rules." The two cited sections deal, respectively, with the adoption of rules of procedure and public inspection (§ 120.53), and the adoption of rules for the filing and disposition of petitions for declaratory statements by the agency (§ 120.56(1) in the 1974 Act, renumbered § 120.565 by the 1975 amendments). These two sections cover most, if not all, of the topics which can be dealt with by the model rules. See text accompanying notes 84-87 *infra*.

83. As enacted in 1974, the Act required the Administration Commission to file one or more sets of model rules ninety days after the effective date of the Act. This language could be interpreted as prohibiting the commission from filing any different model rules after expiration of the ninety days, although the context suggested that the commission was authorized to amend the model rules, and the attorney general had expressed the view that amendment was authorized. Shevin, *The Impact of the Proposed Model Rules on Agencies and Standards for Agency Exemptions*, 3 F.S.U.L. REV. 93, 95 (1975). The 1975 amendments deleted the mention of ninety days after the effective date, apparently for the purpose of adopting the attorney general's interpretation, so that the Administration Commission could amend the model rules at any time. However, the 1975 amendments do not indicate whether the concurrence of the affected agency or agencies is required for an amendment of the applicable model rules.

The second area of uncertainty is the subject matter which may be covered by the model rules. The section of the APA which confers the power to formulate model rules upon the Administration Commission refers to "model rules of procedure."<sup>84</sup> The Administration Commission has adopted the attorney general's interpretation of this language, to the effect that the "model rules of procedure" should cover all matters on which another section of the Act requires agencies to adopt rules.<sup>85</sup> This section under the heading "Adoption of rules of procedure . . ."<sup>86</sup> contains four paragraphs, requiring agency adoption of rules dealing respectively with a description of the agency's organization, its rules of practice, its rules of procedure, and its rules for the scheduling of meetings. The model rules, as adopted by the Administration Commission, indeed cover these matters, in accordance with the attorney general's broad view.<sup>87</sup> Legislative clarification would again be appropriate.

For decades, administrative lawyers have debated the desirability of establishing uniform procedures for all—or at least for most—agencies within a jurisdiction.<sup>88</sup> An administrative procedure act is itself a source of uniform procedures, and most states have long since made the decision to enact an APA.<sup>89</sup> The continuing question, however, has been whether authority should be delegated to a centralized administrative agency to establish and specify, in greater detail than the APA, additional procedures, which would be subject to modification from time to time by administrative, rather than legislative, action. The ABA recommended the administrative creation of uniform procedural rules for the conduct of formal adjudication by federal agencies, "to the extent practicable."<sup>90</sup> The ABA further recommended that the Administrative Conference of the United States draft the uniform rules and pass upon applications for waiver or variance. In commenting on this recommendation, the Conference endorsed "the principle of

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84. 1974 APA § 120.54(9).

85. Shevin, *The Impact of the Proposed Model Rules on Agencies and Standards for Agency Exemptions*, 3 F.S.U.L. REV. 93, 93-94 (1975). This interpretation has been reflected in the drafting of the Model Rules themselves.

86. 1974 APA § 120.53(1) (a)-(d).

87. THE RULES AND REGULATIONS OF THE ADMINISTRATION COMMISSION, CH. 28, MODEL RULES OF PROCEDURE, contain the following titles: CH. 28-1: Organization; CH. 28-2: Agenda and Scheduling of Meetings and Workshops; CH. 28-3: Rule Making Proceedings; CH. 28-4: Declaratory Statements; CH. 28-5: Decisions Determining Substantial Interests; CH. 28-6: Licensing; CH. 28-7: Agency Exemption from CH. 120, F.S., and Modification of Model Rules.

88. See, e.g., Vanderbilt, *Administrative Procedure: Shall Rules Before Agencies be Uniform?*, 34 A.B.A.J. 896 (1948); Washington, *Federal Administrative Agencies: Are Uniform Rules of Procedure Practicable?*, 34 A.B.A.J. 1011 (1948); Wiley, *Administrative Law: Further Improvements in Agency Procedure*, 34 A.B.A.J. 877 (1948). More recent discussions are found in the ABA and ACUS sources cited in notes 90 & 91 *infra*, and in *Symposium—1973 Court Cases Involving Rule-making: Implications for Federal Regulation*, 28 FOOD DRUG COSM. L.J. 729 (1973).

89. See sources cited in note 4 *supra*.

90. Recommendation No. 5, *The 12 ABA Recommendations for Improved Procedures for Federal Agencies*, 24 AD. L. REV. 389, 399 (1972) [hereinafter cited as *ABA Recommendations*].

uniformity of administrative procedures—including procedures governing the conduct of formal adjudication—where considerations of fairness or expedition do not justify differences.”<sup>91</sup> However, the Conference questioned whether it should be required to give priority to such a project, since uniformity is only one of many values of sound administrative procedure.<sup>92</sup>

### C. Rulemaking

An agency can promulgate rules quite simply under the 1974 APA, unless a person invokes one or more of the available procedures during the rulemaking process, which can then make the process quite complex.

#### 1. OVERVIEW OF RULEMAKING UNDER 1974 APA

The Act expressly exempts certain agencies from the rulemaking provisions. Any other agency can, of course, seek a total or partial exemption from the Administration Commission, regarding the rulemaking provisions of the Act.<sup>93</sup> An agency must give public notice of proposed rulemaking, except in the case of emergency rules.<sup>94</sup> The 1975 amendments require the notice to contain, in addition to other matters, an estimate of the economic impact of the proposed rule, or an explanation why the agency cannot make such an estimate.

A hearing need not be conducted unless requested, and the proposed rule can become effective after the lapse of an appropriate period of time after the public notice.<sup>95</sup>

Any affected person shall, upon making timely request, be given an opportunity to present evidence and argument on any proposed rule (with some exceptions) in an informal, quasi-legislative proceeding, appropriate to inform the agency of the person's contentions. The Act does not require a formal hearing, nor even an oral proceeding in these circumstances, unless the person demonstrates to the agency that his substantial interests will not be adequately protected by informal rulemaking proceedings. If such a demonstration is made, the agency must convene a separate, trial-type hearing.<sup>96</sup>

After publication of notice, but before any rulemaking proceed-

91. Resolution No. 5, *Administrative Conference Statement on ABA Proposals to Amend the Administrative Procedure Act*, 25 AD. L. REV. 419, 421 (1973) [hereinafter cited as *ACUS Statement on ABA Proposals*]. See also the report of the ACUS staff, containing more extensive discussion of items which were considered but not necessarily endorsed by the ACUS in its statement. *Administrative Conference Report on ABA Proposals to Amend the Administrative Procedure Act*, 25 AD. L. REV. 425, 440, 442 (1973) [hereinafter cited as *ACUS Staff Report on ABA Proposals*].

92. See text accompanying notes 105-12 *infra*.

93. See text accompanying notes 67-73 *supra*.

94. See text accompanying notes 113-20 *infra*.

95. Dore, *Rulemaking Innovations under the New Administrative Procedure Act*, 3 F.S.U.L. REV. 97, 98 (1975).

96. See text accompanying notes 121-25 *infra*.

ings, any substantially affected person may seek a determination by a hearing officer of the validity of any proposed rule (with some exceptions).<sup>97</sup>

The Administrative Procedures Committee (a joint legislative committee created by the new APA) shall determine whether each proposed rule is within the statutory authority asserted by the agency, whether the rule is in proper form, and whether the agency gave adequate notice. The committee cannot invalidate a proposed rule; however, if the committee disapproves a rule and the agency decides to adopt it notwithstanding such disapproval, the committee's statement shall be published together with the rule.<sup>98</sup>

After a rule has become effective, two types of administrative declaratory relief are available. First, each agency shall provide by rule for the disposition of petitions for declaratory statements as to the applicability of any rule (or order, or statute). Second, any person substantially affected by a rule may seek an administrative determination of the validity of the rule. The matter shall be determined by a hearing officer.<sup>99</sup>

The Act also includes provisions regarding emergency rules, citizen initiation of rulemaking, and other topics.<sup>100</sup>

As indicated by this overview, the rulemaking provisions of the Act prescribe a series of procedures within the agency, subject to elaborate external controls. Some of these provisions were drafted by the Law Revision Council and were included in the bill as originally passed by the House.<sup>101</sup> Other provisions were written by the Senate Rules Committee and were included in the bill passed by the Senate.<sup>102</sup> The conference committee retained both sets of provisions, and combined them together into the bill which became law.<sup>103</sup> The

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97. See text accompanying notes 126-32 *infra*.

98. See text accompanying notes 133-36 *infra*.

99. See text accompanying notes 174-89 *infra*.

100. On emergency rules, see text accompanying notes 140-44 *infra*. On citizen initiation of rulemaking, see text accompanying notes 137-39 *infra*. Other aspects of rulemaking, not included in this overview, are discussed in text accompanying notes 145-73 *infra*.

101. See Law Revision draft in Reporter's Comments, note 31 *supra*, and the House Bill, note 11 *supra*. In particular, the following components of the 1974 APA were not part of either the Law Revision draft or the House Bill: administrative determination of validity of proposed or promulgated rule; creation of Administrative Procedures Committee; and determination of statutory authorization for proposed rule by Administrative Procedures Committee (or by any other means).

102. For the Senate Bill, see note 12 *supra*. The following components of the 1974 APA are not found in the Senate Bill: informal, quasi-legislative hearing at which an affected person can present evidence and argument to the agency on a proposed rule; requirement that agencies provide by rule for disposition of requests for declaratory statements as to applicability of any rule, order or statute. The Senate Bill, like the 1974 APA, provided for administrative determination of the validity of a proposed or promulgated rule. However, the Senate Bill required these hearings to be conducted in accordance with the provisions on formal adjudication of the 1961 APA, which were incorporated without change. By contrast, the 1974 Act requires hearings on the validity of a proposed or promulgated rule to be conducted with the adjudication provisions as rewritten in 1974, including significant changes.

103. See note 13 *supra*.

1975 amendments, by requiring an economic impact statement, add to the processes required for rulemaking.

Whether or not this series of controls is practicable remains to be seen in the light of experience under the new Act. If the controls turn out to be serious burdens on the exercise of rulemaking, the agencies will be tempted to abandon rulemaking as much as possible, while formulating policy by developing precedents from adjudicatory proceedings. This would be an unfortunate development, since the prevailing view among administrative law scholars favors increased rather than decreased use of rulemaking as the primary means of articulating agency policy.<sup>104</sup>

## 2. RULEMAKING PROVISIONS ARE INAPPLICABLE TO CERTAIN AGENCIES

The 1974 APA does not repeat the provision of the 1961 Act which excluded special highway regulations from the rulemaking procedures of the Act.<sup>105</sup> However, the 1974 APA excludes judges of industrial claims and unemployment compensation referees from its rulemaking provisions,<sup>106</sup> while another statute enacted during the same session authorizes the supreme court to adopt rules of practice and procedure for the Industrial Relations Commission, which is the agency with appellate jurisdiction over the judges of industrial claims.<sup>107</sup>

This special statutory treatment of the Industrial Relations Commission is the sequel to occurrences during 1973 while the new APA was being drafted. The commission prepared its own set of Workmen's Compensation Rules of Procedure and voluntarily submitted them to the Florida Supreme Court for examination and approval.<sup>108</sup> The commission invoked the supreme court's constitutional authority to adopt "rules for the practice and procedure in all courts."<sup>109</sup> The supreme court found that its authority had been properly invoked, noting that workmen's compensation determinations were "more ju-

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104. See, e.g., ACUS Recommendation 71-3, Articulation of Agency Policies, 1 C.F.R. § 305.71-3 (1975); K. C. DAVIS, ADMINISTRATIVE LAW, ch. 6 (1972). But see Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 536-37 (1970).

105. 1961 APA § 120.021(2).

106. 1974 APA § 120.54(14).

107. FLA. STAT. § 440.29(3), added by Fla. Laws 1974 ch. 74-197, § 16. Arguably, this statute is an unconstitutional delegation of legislative powers to the supreme court, since the constitution authorizes the court to promulgate rules for courts, FLA. CONST. art. V § 2(a), revising FLA. CONST. art. V, § 2(a) (1968), and the Industrial Relations Commission is simply not a court.

By expressly exempting the Industrial Relations Commission from the rulemaking provisions of the Act, see note 106 *supra*, and from the need to use hearing examiners from the division when conducting formal hearings, see note 249 *infra*, the Act implies that the Industrial Relations Commission is covered by all other provisions. For a contrary view, see *Workmen's Compensation News*, 49 FLA. B.J. 55, 56-57 (1975).

108. *In re Florida Workmen's Compensation Rules of Procedure*, 285 So. 2d 601 (Fla. 1973).

109. FLA. CONST. art. V, § 2(a) (1972), revising FLA. CONST. art. V, § 3 (1968).

*dicial than quasi-judicial.*"<sup>110</sup> The court examined and then approved the commission's rules "to the extent authorized in the constitution."<sup>111</sup>

The Industrial Relations Commission was created and could be abolished by statute.<sup>112</sup> In this writer's view, the commission is an administrative, not a judicial, tribunal, and could be brought within the full coverage of the APA if the legislature chose to do so. The decision to exclude the commission from the rulemaking provisions of the APA can be interpreted as a legislative reaction to the pressure which had been exerted in this direction by the events of 1973. This exclusion is inconsistent with the general approach of the 1974 APA, which extends to the broadest possible range of agencies and functions, subject to discretionary exemptions granted by the Administration Commission. A future legislature may well review the policy reasons for and against continuing the exclusion of the Industrial Relations Commission from the rulemaking provisions.

### 3. AGENCY MUST GIVE PUBLIC NOTICE BEFORE RULEMAKING EXCEPT FOR EMERGENCY RULES

An agency must give notice of its intention to adopt, amend or repeal any rule, except an emergency rule (to be discussed later). The notice shall include a short and plain explanation of the purpose and effect of the proposed rule, a summary of its provisions, and a citation to the underlying legal authority.<sup>113</sup> In addition, the agency shall set forth an estimate of the economic impact of the proposed rule on all persons affected by it.<sup>114</sup> If the agency determines that such a statement is not possible, the reason that the costs of the proposed rule cannot be estimated shall be stated in the notice.

The Act distinguishes "educational units" from other agencies, as regards the method of publicizing the notice of proposed rulemaking.<sup>115</sup> The term "educational units" is defined as "local school districts, community college districts, the Florida School for the Deaf and Blind, and units of the state university system other than the board of regents."<sup>116</sup> Educational units shall give notice of proposed rulemaking, other than emergency rules, by a combination of newspaper

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110. *In re* Florida Workmen's Compensation Rules of Procedure, 285 So. 2d 601 (Fla. 1973).

111. *Id.* at 602.

112. The Industrial Relations Commission is not mentioned in the Florida Constitution. It was created by statute: FLA. STAT. § 20.17(7) (Supp. 1974).

113. 1974 APA § 120.54(1).

114. The requirement of an economic impact statement was added by the 1975 amendments.

115. As enacted in 1974, the APA included some distinctions for certain types of educational institutions. The 1975 amendments introduced and defined the term "educational units." See note 116 *infra*. The new definition covered more types of institutions than had been subjected to special treatment under the 1974 language. In addition, the 1975 amendment established more distinctions between the publicity required of educational units and of other agencies.

116. The definition was added by Fla. Laws 1975, ch. 75-191, creating FLA. STAT. § 120.52(6) (1975).

publication in the affected area, mailing to persons who have requested advance notice and to organizations representing affected persons, and posting in appropriate places. Other agencies shall give notice by mailing to all persons named in the proposed rule and to all persons who have requested advance notice, and shall also give such notice as is prescribed by rule to particular classes of persons to whom the intended rulemaking is directed. Advance publication in the Florida Administrative Weekly, and filing with the Administrative Procedures Committee of the legislature<sup>117</sup> are required of all proposed rulemaking except for emergency rules and rules proposed by educational units or units of government with jurisdiction in only one county or part thereof.

These provisions of the 1974 APA require notice of all proposed rulemaking (except emergency rulemaking), whether or not a hearing is conducted. By contrast, the 1961 Act required public notice of proposed rulemaking only if the agency proposed to conduct a hearing.<sup>118</sup> In that situation, notice had to be published in four or more newspapers of general circulation or mailed to parties who had requested inclusion on the agency's mailing list, or mailed to each licensee or association of licensees when the agency had proposed rules pertaining to the licensing of a trade, business, occupation or profession.

The new provisions adopt and expand upon the policy of public notice of all proposed rulemaking, reflected in the RMA<sup>119</sup> and the federal APA.<sup>120</sup>

The requirement of the economic impact statement is not found in either the 1961 Florida APA, the RMA or the federal APA. It appears to place a severe burden upon the agency which proposes rulemaking, and this burden may outweigh the benefits yielded by the additional information.

#### 4. AFFECTED PERSONS MAY PRESENT EVIDENCE AND ARGUMENT

Upon making timely request, any affected person shall be given an opportunity to present evidence and argument on all issues under consideration during any agency rulemaking, except if the rule relates exclusively to organization, procedure or practice.<sup>121</sup> The manner of presentation shall be "appropriate to inform [the agency] of [the] contentions [of such affected person]." The 1961 Act contained no comparable provision.

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117. See text accompanying notes 423-25 *infra*.

118. 1961 APA § 120.041(4)-(5).

119. RMA § 3(a).

120. 5 U.S.C. § 553(b), (d) (1970).

121. 1974 APA § 120.54(2).

The new Florida Act establishes, by this provision, the type of rulemaking which is generally known in the literature of administrative law as "notice-and-comment," or "informal" rulemaking.<sup>122</sup> The RMA provides for notice-and-comment.<sup>123</sup> This type of proceeding is also found in the federal APA, subject to transformation into a formal, trial-type hearing if the relevant statute so requires.<sup>124</sup> The new Florida Act adds an innovative feature to further protect affected persons. If the affected person demonstrates to the agency that his substantial interests will not be adequately protected by informal rulemaking proceedings, the agency must convene a separate, trial-type hearing, which shall be formal if a disputed issue of material fact is involved; otherwise the procedure is informal.<sup>125</sup>

#### 5. HEARING OFFICER MAY DETERMINE VALIDITY OF PROPOSED RULE

Upon application by any substantially affected person, a hearing officer shall determine the validity of any proposed rule, except one relating exclusively to organization, procedure or practice.<sup>126</sup>

Application must be made to the Division of Administrative Hearings within 14 days after publication of the notice of proposed rulemaking. Only two grounds may be asserted before the hearing officer: that the proposed rule is an invalid exercise of validly delegated legislative authority, or that the proposed rule is an exercise of invalidly delegated legislative authority.<sup>127</sup> If the director of the Division of Administrative Hearings determines that the petition complies with these requirements, he shall assign a hearing officer who shall conduct a hearing.

The agency proposing the rule and the person requesting the determination of its validity shall be adversary parties before the hearing officer. Other substantially affected persons may join as parties or intervenors. The hearing officer's order shall be final agency

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122. Clagett, *Informal Action—Adjudication—Rule Making: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51; Fitzgerald, *Mobil Oil Corp. v. Federal Power Commission and the Flexibility of the Administrative Procedure Act*, 26 AD. L. REV. 287 (1974); Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974); Wright, *Court of Appeals Review of Federal Regulatory Agency Rulemaking*, 26 AD. L. REV. 199 (1974).

123. RMA § 3(a)(2).

124. 5 U.S.C. § 553(c) (1970). On informal rulemaking by federal agencies and the special factors considered by courts in the review thereof, see *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238 (D.C. Cir. 1973); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973). On judicial review under the 1974 APA, see text accompanying notes 346-412 *infra*.

125. 1974 APA § 120.57. This section is discussed in text accompanying notes 231-88 *infra*.

126. 1974 APA § 120.54(3). This subsection reflects some amendments made in 1975, especially with regard to the provisions in text accompanying notes 128-29 *infra*.

127. A challenge on similar grounds can be asserted in declaratory proceedings before a hearing officer after a rule has become effective. See text accompanying notes 178-89 *infra*.



action.<sup>128</sup> Failure to proceed under this provision shall not constitute failure to exhaust administrative remedies.<sup>129</sup>

If a disputed issue of material fact is involved, the hearing officer must conduct a formal, trial-type hearing.<sup>130</sup> If, however, no such question is involved, the Act is ambiguous whether the hearing must still be formal, or whether the officer may conduct an informal trial-type proceeding. Section 120.54(3) provides simply for "[h]earings . . . in the same manner as provided in § 120.57. . . ." Subsection (1) of section 120.57 deals with formal proceedings where a disputed issue of material fact is involved, and subsection (2) deals with informal proceedings in other situations. The term "hearing" appears only in subsection (1), not in subsection (2). The provision on determining the validity of a proposed rule may therefore be interpreted in one of two ways. First, it could be taken to require a formal hearing, on the theory that the term "hearing" appears only in subsection (1), which deals with formal hearings; thus the legislature could be presumed to have intended "[h]earings . . . in the same manner as provided in § 120.57[(1)] . . . ." Second, the opposite interpretation could be argued, by claiming that the legislature intended to require "[p]roceedings" . . . in the same manner as provided in § 120.57 . . . be they formal or informal, depending on whether or not a disputed issue of material fact is involved. Legislative clarification is needed on this point.

Meanwhile, in this writer's view, the first interpretation should be rejected as yielding an absurd result which should not be attributed to the legislature since a more sensible meaning can be derived from the ambiguous statute. If the validity of the proposed rule involves solely a matter of law—and this will typically be the case—there appears to be no need for a formal hearing, since the entire thrust of the new APA is to provide formal hearings only when a disputed issue of material fact is involved.<sup>131</sup> A hearing examiner can have ample opportunity, on the

128. 1974 APA § 120.54(3). As enacted in 1974, the APA provided that the hearing officer's order would be "judicially reviewable as provided for agency orders." The 1975 amendment deleted that language, and inserted the provision that the hearing officer's orders shall be final agency action. This provision makes clear that after the hearing officer has made a determination, the agency which proposed the rule has no authority to review that determination, which is subject at once to judicial review.

129. As enacted in 1974, the APA stated that the remedy provided in this subsection "is in addition to any other remedies available." The 1975 amendment deleted that language, and inserted the provision that failure to proceed under this subsection "shall not constitute failure to exhaust administrative remedies."

130. 1974 APA § 120.57.

131. The ambiguity in the Act arises because of differences between the Senate and House Bills—a matter which the conference committee did not clearly address. The Senate Bill (*see* notes 12 & 102 *supra*) provided for an administrative determination of the validity of proposed or promulgated rules and required the hearings to be conducted in accordance with the adjudication provisions of the 1961 Act, which were incorporated without change into the Senate Bill. These 1961 provisions dealt only with formal adjudication. Consequently, the Senate Bill clearly required that the proceedings for administrative determination of the validity of proposed or promulgated rules be conducted as formal hearings. The House Bill (*see* notes 11 & 101 *supra*) made no provision for administrative determination of the validity of proposed or promulgated rules. However, the House Bill created the informal proceeding and established the policy that

basis of the record of an informal proceeding, to rule effectively on matters of law.

The APA in addition provides that if a proposed rule is declared invalid by the hearing officer, the agency shall not adopt it.<sup>132</sup> If part of a proposed rule is declared invalid, the agency must withdraw the invalid part and may in its sole discretion withdraw the entire proposed rule. The 1961 APA, the RMA and the federal APA differ from the 1974 APA in that they contain no provisions wherein the hearing officer determines the validity of a proposed rule.

#### 6. ADMINISTRATIVE PROCEDURES COMMITTEE MAY DISAPPROVE PROPOSED RULE

After the final hearing on each proposed rule, the adopting agency shall file documents with the Administrative Procedures Committee updating the information filed when the rule was proposed, including the text of the rule together with detailed facts and circumstances justifying it.<sup>133</sup> The committee shall examine all proposed rules to determine whether they are within the statutory authority asserted, whether the rules are in proper form, and whether the agency gave adequate notice of the effect of the proposed rule.

If the committee disapproves a proposed rule, the committee shall render a statement detailing its objections prior to the effective date of the rule. The agency proposing the rule then has three choices. First, it can modify the rule in an attempt to meet the committee's objections; the modified rule is then resubmitted to the committee. Second, the agency can withdraw the rule in its entirety; the agency is deemed to have made this choice if it fails to do anything else for thirty days. Third, the agency can declare its refusal to modify or to withdraw the rule. The rule will then be adopted upon filing with the Department of State,<sup>134</sup> which must, however, publish not only the rule, but also the committee's detailed statement of disapproval.<sup>135</sup>

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formal hearings would be required only when a disputed issue of material fact was involved. The conference bill, which was enacted into the 1974 APA (*see* note 13 *supra*) adopted both the administrative determination of the validity of proposed or promulgated rules (originated by the Senate Bill) and the informal adjudicatory proceeding (originated by the House Bill) without clearly explaining their interaction. In this author's view, primacy should be accorded to the policy reflected in the bill as enacted, requiring formal hearings only when disputed issues of fact are involved. This policy should supersede the intent of the Senate Bill, which did not address the question of informal proceedings at all.

132. 1974 APA § 120.54(3).

133. 1974 APA § 120.54(10), as modified by the 1975 amendments. Subsection (10)(c) declares this provision inapplicable to educational units other than units of the state university system, or local units of government with jurisdiction in only one county or a part thereof, or to emergency rules adopted pursuant to section 120.54(8), provided that agencies adopting emergency rules shall file a copy of each emergency rule with the committee. The Administrative Procedures Committee, established by the 1974 APA, is discussed in text accompanying notes 423-25 *infra*. *See* Lewis, *The Role of the Joint Legislative Administrative Procedures Committee*, 3 F.S.U.L. REV. 82 (1975).

134. 1974 APA § 120.54(11). On the effective dates of rules, *see* text accompanying note 145 *infra*.

135. 1974 APA § 120.54(12).

Neither the 1961 APA, the RMA, nor the federal APA contain a similar provision. However, some state and federal statutes do require certain types of administrative action to be submitted to the legislature or its delegate for clearance.<sup>136</sup>

7. ANY REGULATED OR SUBSTANTIALLY INTERESTED  
PERSON MAY PETITION FOR RULE

Any person regulated by an agency or having a substantial interest in an agency rule may petition the agency to adopt, amend, or repeal a rule.<sup>137</sup> Within thirty days, the agency shall either initiate rulemaking proceedings or deny the petition with a written statement of reasons. The 1961 APA made no provision on this point.

Both the RMA<sup>138</sup> and the federal APA<sup>139</sup> permit any interested person to petition for the issuance of a rule.

8. AGENCY MAY ADOPT EMERGENCY RULE EFFECTIVE  
FOR NO LONGER THAN NINETY DAYS

If an agency finds that an immediate danger to the public health, safety or welfare requires emergency action, the agency may adopt any rule necessitated by the immediate danger.<sup>140</sup> The emergency rule may be adopted by any procedure which is fair under the circumstances and is necessary to protect the public interest. The procedure, however, must comply with due process requirements of the state and federal constitutions, as well as with any pertinent statute dealing with the subject-matter of the emergency rule, and the agency must publish in writing, no later than the time of its action, the specific facts and reasons for finding an immediate danger and the reasons for using the selected procedure. Notice of emergency rules shall be published in the first available issue of the Florida Administrative Weekly.<sup>141</sup> The agency's findings of an immediate danger, the necessity for an emergency rule, and the fairness of the selected procedure shall be judicially reviewable.

Emergency rules may relate to perishable agricultural commodities, amongst other topics.

An emergency rule may not be effective for longer than ninety

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136. See, e.g., 1 F. COOPER, STATE ADMINISTRATIVE LAW 221-30 (1965); Note, "*Laying on the Table*"—A Device for Legislative Control over Delegated Powers, 65 HARV. L. REV. 637 (1952). Some states require clearance by the attorney general before a proposed rule can become effective 1 F. COOPER, STATE ADMINISTRATIVE LAW 220-21 (1965); NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, REPORT ON THE OFFICE OF ATTORNEY GENERAL 340-43 (1971).

137. 1974 APA § 120.54(4).

138. RMA § 6.

139. 5 U.S.C. § 553(e) (1970).

140. 1974 APA § 120.54(8).

141. The 1975 amendments added the requirement of publication in the first available issue of the Florida Administrative Weekly.

days and may not be renewed. However, the agency may take identical action by normal rulemaking procedures. An emergency rule can become effective immediately upon filing or on a date less than twenty days after filing if so specified in the rule.

Under the 1961 APA,<sup>142</sup> an emergency rule could be promulgated to take effect immediately and to remain in effect for no more than ninety days. The agency had to make a written finding that such action was necessary for an immediate preservation of the public health, peace, safety or general welfare.

The 1974 Act prohibits the renewal of an emergency rule by means of another emergency rule. The 1961 Act was silent on this point and presumably permitted renewal if the agency could again certify the existence of an emergency.

The RMA<sup>143</sup> and the federal APA<sup>144</sup> both provide for the promulgation of emergency rules, but neither includes the amount of detail found in the new Florida APA.

#### 9. RULES GENERALLY BECOME EFFECTIVE TWENTY DAYS AFTER FILING WITH SECRETARY OF STATE

An agency is deemed to have "adopted" a rule upon filing it with the Secretary of State following completion of agency proceedings.<sup>145</sup> Rules generally become effective twenty days after filing with the Secretary of State, or on a later date if specified in the rule or required by statute, or on an earlier date if the emergency rulemaking power has been invoked.

Three types of effective date were provided in the 1961 Act.<sup>146</sup> Rules adopted following a public hearing and notice thereof became effective and operative on the day following filing with the Department of State. Emergency rules became effective and operative immediately upon filing. All other rules became effective upon filing, but did not become operative until forty-five days after a summary of the rule had been published in the Florida Administrative Register. Later dates could be specified in the rule itself.

The RMA deals with the effective dates of rules in language almost identical to the new Florida APA.<sup>147</sup> The federal APA declares that "substantive" rules shall generally be published or served not less than thirty days prior to their effective date "except as otherwise provided by the agency upon good cause found and published with the rule."<sup>148</sup>

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142. 1961 APA § 120.041(3).

143. RMA §§ 3(b), 4(b)(2).

144. 5 U.S.C. § 553(d)(3) (1970).

145. 1974 APA § 120.54(11).

146. 1961 APA § 120.041.

147. RMA § 4(b).

148. 5 U.S.C. § 553(d) (1970).

# 10. AGENCY HAS NO INHERENT AUTHORITY TO MAKE RULES OR TO PENALIZE VIOLATIONS

The 1974 APA recites that no agency has inherent rulemaking authority and that no agency has authority to establish penalties for violating a rule unless the legislature, when establishing a penalty, specifically provided that the penalty would apply to violations of the rules.<sup>149</sup>

No equivalent provisions can be found in either the 1961 Florida APA, the RMA, or the federal APA. The recital in the new Act was intended to clarify questions which have repeatedly arisen in administrative practice and litigation.<sup>150</sup> This clarification appears to serve a useful purpose, even though arguably it does not address any question of administrative procedure, and therefore may not fall within the logical coverage of an administrative procedure act.

# 11. OFFICIAL RECOGNITION

The 1974 APA provides that in rulemaking proceedings the agency may recognize any material which may be judicially noticed and may provide that materials so recognized shall be incorporated into the record of the proceeding.<sup>151</sup> Before completing the record, the agency shall provide each party with a list of such materials and shall give the parties a reasonable opportunity to examine these materials and offer written comments on them or rebuttal thereto.

No comparable provision appears in either the 1961 APA, the RMA, or the federal APA.

As enacted, the new provision differs from the Law Revision Council draft and the House bill. These versions authorized the agency not only to take "official recognition," but also to provide that written data, reports or other documents in its files could be incorporated into the record of the proceeding.<sup>152</sup> The Reporter's Comments noted that agencies should be given the opportunity, by this provision, to make use of their accumulated expertise, while parties should have an opportunity to analyze and challenge the matters relied upon.<sup>153</sup>

This author interprets the Act as meaning what the Law Revision Council intended. This interpretation is based on the theory that the

149. 1974 APA § 120.54(13).

150. *Florida Growers Coop Transp. v. Department of Revenue*, 273 So. 2d 142 (Fla. 1st Dist. 1973); *Lewis v. Florida State Bd. of Health*, 143 So. 2d 867 (Fla. 1st Dist. 1962), *cert. denied*, 149 So. 2d 41 (Fla. 1963). On the subject of implied versus express powers of agencies, see *St. Regis Paper Co. v. State*, 237 So. 2d 797 (Fla. 1st Dist. 1970), *aff'd in part, expunged in part*, 257 So. 2d 253 (Fla. 1971); *Williams v. Florida Real Estate Comm'n*, 232 So. 2d 239 (Fla. 4th Dist.), *quashed* 240 So. 2d 304 (Fla. 1970); *Keating v. State ex rel. Ausebel*, 167 So. 2d 46 (Fla. 1st Dist. 1964), *quashed* 173 So. 2d 673 (Fla. 1965).

151. 1974 APA § 120.54(5).

152. Law Revision draft dated March 1, 1974, § 0120.4(4) (included as an appendix to Reporter's Comments, note 31 *supra*). The House Bill is identical to the Law Revision draft in this respect. House Bill (see note 10 *supra*) § 120.54(3).

153. Reporter's Comments, *supra* note 31, at 16.

portion of the council's draft, which was omitted by the legislature, was superfluous. In the context of notice-and-comment rulemaking, where any affected person can present evidence and argument,<sup>154</sup> it appears that the agency itself should be allowed to present evidence for the record, consisting of the contents of the agency's own files. No express statutory language seems to be needed to reach this result, although the APA would have achieved additional clarity by retaining rather than omitting the language on this point as drafted by the Law Revision Council.

## 12. FORMAL REQUIREMENTS OF RULES; AMENDMENTS

Each rule shall be accompanied by a reference to the specific rulemaking authority and to the section or subsection of law involved.<sup>155</sup>

Each rule shall contain only one subject and shall be preceded by a concise statement of the purpose of the rule and reference to any rules repealed or amended. No rule shall be amended by reference only; amendments shall set out the amended rule in full, in the same manner as the constitution requires for amending laws.

The last sentence is an innovation of the 1974 APA. The remainder of the provision is a repetition of the 1961 APA.<sup>156</sup>

Neither the RMA nor the federal APA addresses this topic.

### D. *Public Access and Publication*

The Act deals separately with public access to agency records of final action and publication of rules and other items.

## 1. PUBLIC ACCESS TO AGENCY RECORDS OF FINAL ACTION

Each agency shall make available for public inspection and copying all rules formulated, adopted or used by the agency, all agency orders, and a current subject-matter index of all of the agency's rules and orders adopted or issued after the effective date of the Act.<sup>157</sup> Rules shall be indexed within ninety days after adoption. No rule or order is valid for any purpose until it has been made available for public inspection, unless the person against whom enforcement is sought has actual knowledge of it.

The 1961 APA contained no provision regarding public access to agency records of final action, although the Public Records Law<sup>158</sup> may have provided at least some access. The 1974 requirement that public access be a condition precedent to the validity of any rule or order is also new.

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154. See text accompanying notes 121-25 *supra*.

155. 1974 APA § 120.54(6), (7).

156. 1961 APA § 120.031(2), (3).

157. 1974 APA § 120.53(2), (3).

158. FLA. STAT. §§ 119 *et seq.* (1973).

The RMA<sup>159</sup> requires public access to rules and orders, but does not define the term "order" as broadly as does the new Florida APA.<sup>160</sup> Consequently, the new Florida Act requires access to more types of agency action than does the RMA. Further, the Florida Act, unlike the RMA, requires preparation of a subject-matter index. The federal Freedom of Information Act<sup>161</sup> requires public access to rules, orders, and index, and the Act further requires publication of the index except in some limited circumstances.

The extremely broad public access provided by the new Florida APA raises some policy questions. Arguably, some orders include information about trade secrets, financial, medical or other matters, where the interests of the parties in maintaining confidentiality may outweigh the interest of the general public in having complete access. It would seem preferable to provide that names and other identifying information be deleted from such orders before their inclusion in the public files.<sup>162</sup> By requiring full disclosure, the new Florida Act apparently prohibits the deletion of names, but the Administration Commission could and arguably should exercise its power to consider granting selective permission to adopt a policy for the deletion of names, under its general power to grant partial exemptions from the Act, subject to legislative review.<sup>163</sup>

## 2. PUBLICATION OF RULES AND OTHER ITEMS

Three types of publication of rules are provided for in the Act.

### a. Florida Administrative Code

The Department of State shall publish a permanent compilation entitled Florida Administrative Code, containing all the rules adopted by each agency, together with indices.<sup>164</sup> Supplementation shall be made as often as practicable, but at least monthly. The code shall not include rules which apply only to one school district, community college district, county, or a part thereof, or to the Florida School for the Deaf

159. RMA § 2(b).

160. See text accompanying notes 49-56 *supra*.

161. The Freedom of Information Act as section 552 of title V of the United States Code (the federal APA) was amended by the Nov. 21, 1974 enactment which overrode a presidential veto creating 5 U.S.C. §§ 552, 552(a) (Supp. 1975).

162. The Florida Public Records Law (*see* note 158 *supra*) provides for certain exemptions in FLA. STAT. § 119.07(2) (1973). The federal Freedom of Information Act (*see* note 161 *supra*) lists a number of exemptions, including the following in 5 U.S.C. § 552(b) (Supp. 1975):

- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . .
- (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) [as amended in 1974] investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (C) constitute an unwarranted invasion of personal privacy . . . .

163. The exemption mechanisms of the 1974 Florida APA are discussed in the text accompanying notes 67-73 *supra*.

164. 1974 APA § 120.55(1)(b).

and Blind. Rules so omitted shall be filed in the Department of State, and the department shall publish a compilation and index of them at least annually. The 1974 APA thus preserves the Florida Administrative Code created by the 1961 APA.<sup>165</sup>

b. *Florida Administrative Weekly*

The Department of State shall publish a weekly pamphlet entitled *Florida Administrative Weekly*, which shall contain the following: (1) a summary and index of all proposed rules filed during the preceding week; (2) all notices of proposed rulemaking; (3) all notices of meetings, hearings and workshops conducted in accordance with the Act; (4) notice of each request for authorization to amend or repeal an existing model rule or for the adoption of new model rules; (5) notice of each request for exemption from any provision of the Act; (6) notice of petitions for declaratory statements or administrative determinations; (7) a summary of each objection filed by the joint Administrative Procedures Committee; and (8) any material required or authorized by law, or deemed useful by the department.<sup>166</sup>

The *Florida Administrative Register* created by the 1961 Act<sup>167</sup> as a monthly summary and index of all rules filed during the preceding month, has been replaced, under the 1974 Act, by the *Florida Administrative Weekly*, which includes more materials than did its predecessor.

c. *Agency publication of its own rules*

Each agency shall print or distribute copies of its rules or purchase copies from the Secretary of State for distribution.<sup>168</sup>

The 1961 Act permitted,<sup>169</sup> while the 1974 Act requires, agencies to distribute copies of their own rules.

The RMA<sup>170</sup> requires a compilation of rules, similar to the *Florida Administrative Code*. The federal counterpart is the *Code of Federal Regulations*.<sup>171</sup>

The RMA<sup>172</sup> also requires publication of a monthly bulletin, setting forth the text of all rules filed during the preceding month. The new *Florida Administrative Weekly* must include, in addition, notices of proposed rulemaking and various other matters. These Florida

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165. 1961 APA § 120.051(1)(b).

166. 1974 APA § 120.55(1)(c). Items (3) through (7) were added by the 1975 amendments. Fla. Laws 1975, ch. 75-107, imposes the additional requirement that the *Florida Administrative Code*, and other copies of rules distributed by agencies, cite the specific rulemaking authority pursuant to which each rule was adopted.

167. 1961 APA § 120.051(1) (b).

168. 1974 APA § 120.55(2).

169. 1961 APA § 120.051(2).

170. RMA § 5(a).

171. The *Code of Federal Regulations* was established by 44 U.S.C. § 1510 (1970).

172. RMA § 5(b).



requirements go beyond those of the Federal Register,<sup>173</sup> which, however, is published daily.

### E. *Declaratory Statements*

The Act provides two distinct types of declaratory determinations.

#### 1. DECLARATORY STATEMENT ON APPLICABILITY OF STATUTE, RULE OR ORDER

"Each agency shall provide by rule the procedure for the filing and prompt disposition of petitions for declaratory statements as to the applicability of any statutory provision or of any rule or order of the agency."<sup>174</sup> Agency disposition of petitions shall be final agency action and consequently shall be subject to judicial review.

The 1961 Act did not expressly authorize agencies to render declaratory statements. This authority presumably existed, however, as part of the general adjudicatory power of the agencies. This conclusion is suggested by the 1961 definition of "order," which included agency decisions "whether affirmative, negative, injunctive, or *declaratory* . . . in any matter other than rulemaking."<sup>175</sup> The RMA<sup>176</sup> and the federal APA<sup>177</sup> include provisions similar to the 1974 Florida Act.

#### 2. DECLARATORY STATEMENT ON VALIDITY OF RULE

Any person substantially affected by a rule may seek an administrative determination of the validity of the rule.<sup>178</sup> This proceeding closely resembles the type of proceeding where a hearing officer may determine the validity of a *proposed* rule;<sup>179</sup> the major difference is that the provision now being discussed deals with the validity of a rule which is already in effect.

The same grounds for determining the validity of a proposed rule may be asserted here: that the rule is an invalid exercise of validly delegated legislative authority or that the rule is an exercise of invalidly delegated legislative authority. The agency whose rule is attacked and the petitioner shall be adversary parties before the hearing officer. Other substantially affected persons may join as parties or intervenors. The Act contains the same ambiguity in this provision as in the provision on the determination of the validity of a proposed rule—as to whether or not the hearing officer may proceed informally if no disputed issue of material fact is involved.<sup>180</sup>

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173. The Federal Register was established by 44 U.S.C. §§ 1505-09 (1970).

174. 1974 APA § 120.56(1).

175. 1961 APA § 120.21(3) (emphasis added).

176. RMA § 8.

177. 5 U.S.C. § 554(e) (1970). See Comment, *Declaratory Orders: Uncertain Tools to Remove Uncertainty?*, 21 AD. L. REV. 257 (1969).

178. 1974 APA § 120.56(2).

179. See text accompanying notes 126-32 *supra*.

180. *Id.*

Within thirty days after the hearing, the officer shall render his decision together with written reasons. Any rule or part of a rule declared invalid shall become void when the time for filing an appeal expires or at a later date specified in the decision. The hearing officer's determination shall be final agency action.<sup>181</sup> Failure to proceed under this section shall not constitute failure to exhaust administrative remedies.

The 1961 APA, not contemplating a centralized hearing officer system, did not contain any authorization for a hearing officer within an agency to pass upon the validity of that agency's rules.

The 1961 Act<sup>182</sup> authorized any affected party to obtain a judicial declaration as to the validity, meaning or application of any rule; an action for declaratory judgment could be brought in the circuit court of the county in which the party resided or in which the executive offices of the agency were maintained. This type of declaratory action is no longer mentioned in the 1974 APA, which states that all petitions for review of administrative action shall be filed in the district court of appeal, unless another statute specifies review in the supreme court instead.<sup>183</sup> However, the 1975 amendments to the APA expressly preserve the jurisdiction of the circuit courts under the Declaratory Judgment Act.<sup>184</sup> The concurrent jurisdiction of the circuit courts and the administrative tribunals will be discussed under a later heading.<sup>185</sup>

The RMA<sup>186</sup> and the federal APA,<sup>187</sup> under the provisions which authorize declaratory statements on the *applicability* of rules, both imply that agencies or hearing officers may render declaratory statements on the *validity* of rules. Neither the RMA nor the federal APA, however, has established the detailed mechanism contained in the new Florida Act for declaratory statements on the validity of rules.

The RMA<sup>188</sup> provides for declaratory judgments by trial courts on the validity or applicability of a rule, whether or not the plaintiff has requested the agency to pass upon the same question. The federal APA broadly authorizes any special statutory review proceeding, or, in the absence or inadequacy thereof, "any applicable form of legal action (including actions for declaratory judgements . . .) in any court of competent jurisdiction."<sup>189</sup>

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181. The 1975 amendments inserted "final agency action," and deleted the original 1974 language, which provided that the hearing examiner's order would be judicially reviewable. See note 129 *supra*, on a similar change to another section of the Act.

182. 1961 APA § 120.30.

183. See text accompanying notes 346-47 *infra*, discussing 1974 APA § 120.68(2).

184. See note 351 *infra* and accompanying text.

185. See notes 368-70 *infra*, and accompanying text.

186. RMA § 8.

187. 5 U.S.C. § 554(e) (1970).

188. RMA § 7.

189. 5 U.S.C. § 703 (1970).

### F. *Toward Administrative Stare Decisis*

Three provisions of the Act, appearing in different sections, can be combined so as to develop an approach toward administrative stare decisis.

#### 1. FINAL ORDER SHALL INCLUDE FINDINGS OF FACT AND CONCLUSIONS OF LAW

The final order in a proceeding which affects substantial interests shall be in writing or stated in the record and shall include findings of fact and conclusions of law, separately stated.<sup>190</sup>

#### 2. PUBLIC SHALL HAVE ACCESS TO AGENCY RULES AND ORDERS WITH SUBJECT-MATTER INDEX

As stated under a previous heading, the public shall have access to inspect and copy all agency rules and orders and current subject-matter index.<sup>191</sup>

#### 3. REVIEWING COURT SHALL REMAND FOR UNEXPLAINED DEPARTURE FROM PRIOR PRACTICE

One aspect of judicial review<sup>192</sup> is noteworthy in context of the present discussion. The court shall remand a case to the agency upon finding that the agency action is inconsistent with an agency rule, an officially stated agency policy, or a prior agency practice if deviation therefrom is not explained by the agency.<sup>193</sup> Insofar as prior agency orders are regarded as "prior agency practice," this provision evidently means that a reviewing court shall remand if the agency makes an unexplained departure from its own precedent. If the agency does explain a departure, presumably the explanation must meet some standard of adequacy and reasonableness in order to satisfy the spirit of this provision.

The 1961 APA contained no provisions comparable to the above. Thus, no systematic method existed for a party to determine if he were receiving the same treatment as the agency had afforded to others similarly situated. If he were able somehow to demonstrate such a circumstance, he would have a claim arising from the equal protection guarantee.<sup>194</sup> The difficult problem was in making the demonstration. The 1974 Act establishes the mechanism by which this can now be done.

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190. 1974 APA § 120.59(1), discussed in text accompanying notes 214-17 *infra*.

191. 1974 APA § 120.53(2), discussed in text accompanying notes 157-63 *supra*.

192. The judicial review provision, 1974 APA § 120.68, is discussed in text accompanying notes 346-412 *infra*.

193. 1974 APA § 120.68(12).

194. Of course the equal protection clause does not protect against all distinctions, but only against those which are unreasonable. *See, e.g.,* Joe Hatton, Inc. v. Conner, 240 So. 2d 145 (Fla. 1970), and a discussion of equal protection in Levinson, *Florida Constitutional Law Survey*, 28 U. MIAMI L. REV. 551, 609 (1974); Levinson and Ireland, *Florida Constitutional Law Survey*, 30 U. MIAMI L. REV. —, — (1975).

Neither the RMA nor the federal APA requires the agency to follow its own precedents, unless departure from precedent could be regarded as an abuse of discretion.

### G. Agency Proceedings in General

This heading includes a number of aspects of agency proceedings, which should be considered before discussion of the next two headings on formal proceedings and informal proceedings.

#### 1. EVIDENCE AND CROSS-EXAMINATION

In agency proceedings which affect substantial interests,<sup>195</sup> irrelevant, immaterial or unduly repetitious evidence shall be excluded.<sup>196</sup> All other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not it would be admissible in court. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but hearsay shall not be sufficient in itself to support a finding, unless it would be admissible over objection in civil trials.

A party shall be permitted to conduct cross-examination when testimony is taken or documents are made a part of the record.

The 1961 Act's provisions on adjudicative proceedings,<sup>197</sup> generally incorporated "the rules of evidence recognized by law in this state," but added that

due regard shall be given to the technical and highly complicated subject matter agencies must handle and the exclusionary rules of evidence shall not be used to prevent the receipt of evidence having substantial probative effect.<sup>198</sup>

Although the 1974 APA relaxes the rules of evidence at the agency proceeding, the judicial review provisions of the Act require the court to set aside agency action which depends on any finding of fact "that is not supported by competent substantial evidence on the record."<sup>199</sup>

The RMA generally requires that the rules of evidence in civil litigation be followed by the agency, subject to relaxation only if necessary to ascertain facts not reasonably susceptible of proof under these rules.<sup>200</sup> In that event, evidence not admissible in court may be received by the agency, "if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." The judicial review provision of the RMA provides that the court may modify or

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195. The 1975 amendments specify that the provisions regarding admissibility of evidence apply only to proceedings under section 120.57. That section deals with formal and informal proceedings which affect substantial interests. See text accompanying notes 231-32 *infra*.

196. 1974 APA § 120.58(1)(a), (e).

197. Adjudicative proceedings under the 1961 Act were the functional equivalent of proceedings which affect substantial interests under the 1974 revision.

198. 1961 APA § 120.27.

199. 1974 APA § 120.68(10), discussed in text accompanying note 402 *infra*.

200. RMA § 10(1).

reverse an agency decision which is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record."<sup>201</sup>

The federal APA permits the introduction of "any oral or documentary evidence," subject to exclusion of "irrelevant, immaterial, or unduly repetitious evidence," but the final agency action must be supported by "reliable, probative, and substantial evidence."<sup>202</sup> The judicial review section of the federal APA requires the court to reverse agency action if based upon findings "unsupported by substantial evidence" following an on-the-record proceeding.<sup>203</sup>

## 2. OFFICIAL RECOGNITION

"Where official recognition is requested, the parties shall be notified and given an opportunity to examine and contest the material."<sup>204</sup>

The 1961 APA provided that "[w]here any agency order rests on official notice of a material fact not appearing in evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary."<sup>205</sup> The 1974 Act gives parties additional opportunities, at earlier stages of the proceedings, to examine and contest the material involved.

The RMA<sup>206</sup> discusses official recognition in more detail than does the 1974 Florida APA. The federal APA<sup>207</sup> briefly mentions official recognition; its provision is similar to that found in the 1961 Florida Act.

## 3. PROPOSED ORDER

If a majority of those who are to render the final order have not heard the case or read the record, a decision adverse to a party other than the agency itself shall not be made until a proposed order is served upon the parties and they are given an opportunity to file exceptions and present briefs and oral arguments to those who are to render the decision.<sup>208</sup> The proposed order shall contain necessary findings of fact and conclusions of law and a reference to the source of each. The proposed order shall be prepared by the individual who conducted the hearing, if available, or by one who has read the record.

The *proposed* order is in some respects similar to the *recommended* order, discussed under a later heading.<sup>209</sup> Each gives the parties an opportunity to file exceptions to a draft of the final decision.

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201. RMA § 15(g)(5).

202. 5 U.S.C. § 556(d) (1970).

203. 5 U.S.C. § 706(2)(e) (1970).

204. 1974 APA § 120.61.

205. 1961 APA § 120.24(2).

206. RMA § 10(4).

207. 5 U.S.C. § 556(e) (1970).

208. 1974 APA § 120.58(1)(d).

209. The recommended order is discussed in text accompanying notes 273-75 *infra*. The Act itself states that the recommended order and the proposed order coincide when a hearing officer assigned by the Division of Administrative Hearings conducts a hearing. 1974 APA § 120.52(11).

However, some significant differences should be noted. First, the proposed order is rendered by the agency itself, and can become the final decision without further agency action, unless a party files exceptions and the agency reconsiders. By contrast, the recommended order is recommended by a hearing officer, and cannot automatically turn into a final decision; the agency must take follow-up action in order to promulgate a decision. A second distinction is that the Act requires the recommended order to contain more details than are required in the proposed order.

Despite the distinction between proposed and recommended orders, the Act states that when a hearing officer conducts a hearing, "the recommended order is the proposed order."<sup>210</sup> This apparently means that once a hearing officer has rendered a recommended order, the agency shall not render a proposed order. The legislative policy is understandable—that the recommended order gives the parties sufficient opportunity to file exceptions and that the parties do not need the additional opportunity which would be afforded by a proposed order.

The 1961 APA did not provide for a *proposed* order, in the event that a majority of those who were to render the final order had not heard the case or read the record. However, the 1961 Act did require a *recommended* order if the hearing was conducted by a hearing examiner or a member of the agency.<sup>211</sup> The partial overlap between proposed order and recommended order has been noted above.

The federal APA<sup>212</sup> is similar on this point to the 1961 Florida Act, while the RMA<sup>213</sup> resembles the 1974 Florida Act.

#### 4. FINAL ORDER

In a proceeding which affects substantial interests, the final order shall be in writing or stated in the record, and shall include findings of fact and conclusions of law separately stated.<sup>214</sup> It shall be rendered within 90 days after the occurrence of whichever of the following three events is applicable: (1) conclusion of the hearing if conducted by the agency; (2) submission of a recommended order to the agency and to the parties if conducted by a hearing officer; or (3) receipt by the agency of the written and oral material it has authorized to be submitted if there has been no hearing. The 90-day period may be waived or extended with the consent of all parties.

If a party submitted proposed findings of fact or filed any written application or other request in connection with the proceeding, the final order shall include a ruling upon each proposed finding and a brief statement of the grounds for denying the application or request.

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210. 1974 APA § 120.52(12).

211. 1961 APA § 120.25(8).

212. 5 U.S.C. § 557(b) (1970).

213. RMA § 11.

214. 1974 APA § 120.59(1).

If an agency head finds that an immediate danger to the public health, safety, or welfare requires an immediate final order, such an order can be rendered, including a recitation of the facts underlying the finding of immediate danger; the order shall be appealable or enjoined from the date rendered.

The 1961 Act<sup>215</sup> required that the parties be promptly notified of agency action, but did not set time limits within which the agency had to act nor include the other provisions on this topic contained in the 1974 Act.

The RMA<sup>216</sup> does not provide a time limit for the rendition of the final order nor for the immediate final order in emergency situations. In other respects, the RMA resembles the new Florida Act.

The federal APA requires the agency to conclude matters "within a reasonable time . . . [w]ith due regard for the convenience and necessity of the parties or their representatives."<sup>217</sup> In other respects, the federal Act resembles the RMA and the new Florida Act.

## 5. DISQUALIFICATION

Any individual serving alone or with others as an agency head shall be disqualified from serving in an agency proceeding for bias, prejudice, interest or other causes for which a judge may be recused.<sup>218</sup> If the disqualified individual is an appointed official, the appointing power may appoint a substitute to serve in the matter from which the individual is disqualified. If the disqualified individual is an elected official, the Governor may appoint a substitute to serve in the matter.

The 1961 Act<sup>219</sup> provided for disqualification in essentially the same terms as the 1974 Act. However, the 1961 Act made its disqualification provisions inapplicable to the Insurance Commissioner and Treasurer and the Commissioner of Agriculture. Further, the 1961 Act included a special provision with regard to the disqualification of any member of a commission elected by the people and authorized by statutes to exercise judicial powers—apparently meaning the Public Service Commission. Upon disqualification of such an official, the Governor was required to appoint a circuit judge as temporary substitute.

The RMA does not deal with disqualification; the federal APA includes a brief provision on this matter.<sup>220</sup>

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215. 1961 APA § 120.26(7).

216. RMA § 12.

217. 5 U.S.C. §§ 557(c), 555(e), (1970).

218. 1974 APA § 120.71(1).

219. 1961 APA § 120.09(1), (2).

220. 5 U.S.C. § 556(b) (1970).

## 6. AGENCY INVESTIGATIONS

No agency shall conduct any investigatory activity except as authorized by law.<sup>221</sup> Every person who responds to an agency's request for written data or for an oral statement shall be entitled to a transcript at no more than cost.

Any person appearing, whether voluntarily or not, before any hearing officer or agency in any agency investigation or proceeding has the right, at his own expense, to be accompanied, represented and advised by counsel or other qualified representatives.

The requirements of the Act pertaining to formal proceedings and informal proceedings do not apply to agency investigations preliminary to agency action.<sup>222</sup>

Neither the 1961 APA nor the RMA has any provision on this point. The federal APA<sup>223</sup> generally resembles the new Florida APA as to agency investigations.

## 7. SUBPOENAS AND DISCOVERY

The 1974 APA provides that:

[a]n agency or its duly empowered presiding officer, or a hearing officer has the power . . . to issue subpoenas upon the written request of any party or upon its own motion, and to effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida rules of civil procedure.

. . . .  
Any person subject to a subpoena or order directing discovery may, before compliance and on timely petition, request the agency having jurisdiction of the dispute to invalidate the subpoena or order on the ground that it was not lawfully issued, is unreasonably broad in scope, or requires the production of irrelevant material . . . .<sup>224</sup>

Any person failing to comply with a subpoena or order directing discovery shall be in contempt of the agency, unless the subpoena or order is being challenged under the above provision. The agency may punish for contempt if so authorized by law. In the absence of agency action on the default within 30 days, the party requesting the subpoena or discovery order may bring judicial proceedings for enforcement. In the absence of statutory authority for remedy, the violator may be subjected to a fine not to exceed \$500.

The 1961 APA contained brief provisions authorizing the hearing examiner, agency member or agency to issue subpoenas authorized by

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221. 1974 APA § 120.62.

222. 1974 APA § 120.57(4).

223. 5 U.S.C. § 555(c) (1970).

224. 1974 APA § 120.58.



law and to take depositions or cause them to be taken and to "dispose of procedural requests or similar matters."<sup>225</sup> The 1961 Act did not include the details on subpoenas and discovery contained in the 1974 Act.

The RMA contains no provision on point. The federal APA<sup>226</sup> provides for subpoenas, but does not include any penalty for violations.

#### 8. SETTLEMENT

"Unless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order."<sup>227</sup>

The 1961 Act gave each party the right to make offers of settlement or proposals of adjustment. The Act implied that such offers could be the basis of an agreed settlement.<sup>228</sup> The RMA<sup>229</sup> and the federal APA<sup>230</sup> both contain provisions on settlement similar to the new Florida Act.

#### 9. DECISIONS WHICH AFFECT SUBSTANTIAL INTERESTS

Whenever an agency determines the substantial interests of a party, he is entitled to either formal or informal proceedings.<sup>231</sup> The procedures applicable to each are discussed, respectively, under the next two headings.

An agency order, deciding an adjudicatory-type matter, clearly affects the substantial interests of the parties. In addition, a party may assert that his substantial interests will be affected in a rulemaking proceeding.<sup>232</sup> If he demonstrates, and the agency determines, that the normal rulemaking process does not adequately protect his substantial interests, the agency shall convene a separate proceeding for that purpose and may request similarly situated parties to join and participate in such a proceeding. The rulemaking proceeding shall not be concluded prior to the issuance of the final order in the separate proceeding.<sup>233</sup>

Formal proceedings are required, both in adjudications and in covered rulemaking, to the extent that the proceeding involves a

225. 1961 APA § 120.25(2), (4), (7).

226. 5 U.S.C. § 555 (1970). See recommendation No. 10, *ABA Recommendations*, note 90 *supra*, at 406; *ACUS Statement on ABA Proposals*, note 91 *supra*, at 422; *ACUS Staff Report on ABA Proposals*, note 91 *supra*, at 452.

227. 1974 APA § 120.57(3).

228. 1961 APA § 120.26(5).

229. RMA § 9(d).

230. 5 U.S.C. § 554(c) (1970).

231. 1974 APA § 120.57. See generally Oertel, *Hearings under the New Administrative Procedure Act*, 49 FLA. B.J. 356 (1975).

232. *Id.*

233. The accompanying sentence seems to have been implicit in the 1974 version of the Act, but was made explicit by the 1975 amendments.

disputed issue of material fact, unless waived by consent of all parties and the agency involved. Informal proceedings are required in all other determinations which affect substantial interests, unless otherwise agreed.

The 1961 APA referred to agency "hearings," in connection with both rulemaking<sup>234</sup> and adjudication.<sup>235</sup> The term had a different meaning in each context. The Act did not prescribe any particular procedure for rulemaking, and the only result achieved by a rulemaking hearing was to accelerate the date when a rule could become effective and operative. By contrast, the adjudicative hearing was described with some particularity. It was a formal, trial-type hearing, as will be mentioned under later headings.

With reference to this formal, adjudicative hearing, the 1961 APA stated:

Any party's legal rights, duties, privileges or immunities shall be determined only upon public hearing by an agency unless the right to public hearing is waived by the affected party, or unless otherwise provided by law.<sup>236</sup>

As previously indicated,<sup>237</sup> the courts developed the concept of the "quasi-executive" act which was not regarded as adjudication and which therefore did not trigger the right to the formal hearing.

The 1974 Act rejects this approach. A proceeding, either formal or informal, is required when an agency affects the substantial interests of a party. The proceeding must be formal to the extent that a disputed issue of material fact is involved; otherwise it is informal. The need for a formal or informal proceeding can arise not only in adjudication, but also in rulemaking.

The RMA describes the type of hearing required in a "contested case,"<sup>238</sup> which in turn is defined as

a proceeding, including but not limited to ratemaking, [price fixing], and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.<sup>239</sup>

Thus, the RMA does not create the right to a hearing, but merely states how a hearing shall be conducted if another statute requires it. The hearing is formal as will be discussed under the next heading.

Along similar lines, the federal APA does not create the right to a hearing, but describes the formal hearing which shall be conducted "in every case of adjudication required by statute to be determined on the

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234. 1961 APA § 120.041(4).

235. 1961 APA §§ 120.22-.25.

236. 1961 APA § 120.22.

237. See text accompanying notes 50-54 *supra*.

238. RMA § 9(a).

239. RMA § 1(2).

record after opportunity for agency hearing," subject to a number of exceptions.<sup>240</sup>

The new Florida APA differs significantly from the RMA and the federal APA. First, the new Florida Act creates the right to a hearing in situations defined in the Act itself. Second, it provides for both formal and informal hearings, depending on whether or not a disputed issue of material fact is involved. Third, the Act provides that the right to a hearing (either formal or informal) may be recognized either before the proceedings start, or during their progress.<sup>241</sup>

The new term, "substantial interest," which is an essential element in determining whether a proceeding is required, will need definition, at first by the agencies, and ultimately by the courts. The legislative history repeatedly shows the intent of the draftsmen to make the Act broadly applicable,<sup>242</sup> and especially to reject the holding of the *Bay National Bank* case,<sup>243</sup> which had immunized "quasi-executive" functions from the old APA.

#### H. *Formal Proceedings*

##### 1. FORMAL PROCEEDING IS REQUIRED TO EXTENT DISPUTED ISSUE OF MATERIAL FACT IS INVOLVED IN PROCEEDING WHICH AFFECTS SUBSTANTIAL INTERESTS OF PARTY

As has already been noted, the Act requires a formal proceeding to the extent that a disputed issue of material fact is involved in an agency proceeding which affects the substantial rights of a party.<sup>244</sup> This requirement can be invoked not only in adjudicatory-type situations, but also in rulemaking if a party demonstrates and the agency determines that the normal rulemaking process would not adequately protect his substantial interests. In this event the agency shall convene a separate proceeding. The requirement of a formal proceeding can be waived by consent of all parties and the agency involved.

All requests for hearings shall be filed with the agency, except if the hearing is requested for an administrative determination of the validity of a proposed or promulgated rule, in which event the request

240. 5 U.S.C. §§ 554, 556-57 (1970). The federal Act does, however, guarantee a hearing in licensing matters. See text accompanying note 299 *infra*.

241. See text accompanying notes 284-88 *infra*.

242. Reporter's Comments, *supra* note 31, at 10, 11 & 17-18.

243. See note 52 *supra* & accompanying text.

244. See text accompanying notes 231-32 *supra*. The draftsmen of the Act assumed, first, that formal hearings need not be provided for all agency action, and second, that the requirement of a formal hearing should be triggered by the existence of a disputed issue of material fact. Other approaches could have been taken. For example, the nature of the proceeding could have been determined by the size of the amount in controversy or by some factor relating to the complexity of the issue. Experience with the new Act will indicate in due course whether it provides an appropriate test for determining whether or not a formal hearing should be conducted.

shall be filed with the director of the Division of Administrative Hearings.<sup>245</sup> Requests for hearings shall be granted or denied within fifteen days of receipt.<sup>246</sup>

Threshold questions may arise as to whether a disputed issue of material fact is involved, whether the proceeding affects the substantial interests of a party who requests a formal proceeding and, in rulemaking, whether the normal rulemaking process would suffice. The Act does not spell out a mechanism for interlocutory determinations of disputes on these threshold matters. Under one interpretation, the Act implies that such disputes should be resolved, as the threshold determination by the officer whose jurisdiction is being invoked, on the theory that he possesses jurisdiction to define the scope of his own jurisdiction. A contrary interpretation would exclusively vest the courts with jurisdiction to resolve threshold disputes, either in the context of the judicial review of final agency action or by means of interlocutory judicial review if the court determines that this method is necessary to provide an adequate remedy.<sup>247</sup> The question will be considered later in this article during the discussion of informal proceedings.<sup>248</sup>

## 2. HEARING OFFICER CONDUCTS FORMAL PROCEEDINGS WITH SOME EXCEPTIONS

In general, a hearing officer, assigned by the Division of Administrative Hearings shall conduct all hearings in formal matters.<sup>249</sup> The Act lists a number of exceptions to this requirement: hearings before agency heads (or before a member of an agency head) other than those within the Department of Professional and Occupational Regulations; hearings before the Industrial Relations Commission, judges of industrial claims, unemployment compensation appeals referees, Public Service Commission or its examiners, or regarding drivers licenses; hearings within the Division of Family Services of the Department of Health and Rehabilitative Services; and hearings in which the Division of Administrative Hearings is itself a party.

The Division of Administrative Hearings did not exist until created by the 1974 Act.<sup>250</sup> Until then, the 1961 Act required all hearings to be presided over by the agency, by a member of the

245. The 1975 amendments added this provision.

246. The 1975 amendments added this provision with the additional requirement that if the agency elects to request a hearing officer from the division, it shall notify the division within ten days of receipt of the request, asking for the assignment of a hearing officer and, with the concurrence of the division, setting the time, date and place of the hearing.

247. 1974 APA § 120.68(1) provides:

A party who is adversely affected by final agency action is entitled to judicial review. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

248. See text accompanying notes 284-86 *infra*.

249. 1974 APA § 120.57(1).

250. See text accompanying notes 313-25 *infra* for a further discussion of the new organization of Florida hearing examiners.

agency, or by a hearing examiner supplied by the agency "who shall be competent by reason of training or experience."<sup>251</sup>

The RMA does not discuss the organization or status of hearing officers, although the Act recognizes that a hearing may be conducted by a person other than the agency head.<sup>252</sup>

The federal APA<sup>253</sup> establishes a centralized organization of hearing examiners, now called administrative law judges,<sup>254</sup> independent of the agencies. The new Florida Act considerably resembles the federal system, but is even more closely related to the California system, from which it was derived. A group of draftsmen of the new Florida APA visited California and intensively studied that state's system in operation, before finalizing the language of the Florida Act.<sup>255</sup>

The exceptions to the use of the division's hearing officers in the new Florida Act raise policy questions, which will no doubt be reconsidered after some experience has been accumulated.

### 3. NOTICE

All parties shall have an opportunity for a hearing after reasonable notice of not less than fourteen days, unless waived by all parties.<sup>256</sup> The notice shall include: (1) a statement of the time, place, and nature of the hearing; (2) a statement of the legal authority and jurisdiction invoked; (3) a reference to the particular sections of the statutes and rules involved; and (4) a short and plain statement of the matters asserted by the agency and by all parties of record at the time

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251. 1961 APA § 120.24(1).

252. RMA §§ 9(e), 11, 13 include recognition that hearings may be conducted by a person other than the agency head.

253. 5 U.S.C. §§ 3105, 7521, 5362, 3344, 1305 (1970).

254. On August 19, 1972, the Civil Service Commission changed the title of "hearing examiner" under the APA to "administrative law judge." 5 C.F.R. § 930.202(c) (1975). See note 314 *infra*.

255. The Florida task force visited California from December 17 to 21, 1973, and submitted a preliminary written report to the Florida Law Revision Council on March 9, 1974. Task force members were: Senator Tom Johnson (Member Law Revision Council); Representative Curt Kiser (Member, APA subcommittee, House Governmental Operations Committee); Professor Patricia Dore (Florida State University College of Law); William Falck (Executive Assistant to the Chief Justice, Supreme Court of Florida); Barry Lessinger (Attorney, Division of State Planning, Department of Administration); and C. McFerrin Smith III (Executive Director, Law Revision Council).

The task force and the reporter prepared a joint draft of the section of the APA establishing the hearing examiner system. This draft was adopted by the Law Revision Council, was slightly changed by the House Bill, and underwent further changes in the conference committee bill which was enacted.

The final version of the APA retains a substantial resemblance to the California system, from which the task force had adapted its proposal. See CALIF. GOV. CODE, §§ 11370 *et seq.* (1966) as amended by Calif. Stat. 1971, ch. 1303, §§ 1-5; CALIF. GOV. CODE § 11512 (Supp. 1975); Coan, *Operational Aspects of a Central Hearing Examiners Pool: California's Experiences*, 3 F.S.U.L. REV. 86 (1975).

256. 1974 APA § 120.57(1) (a). The 1975 amendments added the words "unless waived by all parties."

notice is given, subject to amplification by a more definite and detailed statement not less than three days before the scheduled hearing date.

The 1961 Florida Act,<sup>257</sup> the RMA<sup>258</sup> and the federal APA<sup>259</sup> all contain somewhat similar provisions, but none of them includes a provision similar to the one in the 1974 Florida Act providing for a minimum number of days' notice.

#### 4. RIGHTS OF PARTIES AT HEARING

At a hearing all parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of fact and orders, to file exceptions to any order or hearing officer's recommended order, and to be represented by counsel.<sup>260</sup>

The 1961 Act<sup>261</sup> was generally similar to the 1974 Act regarding the rights of parties during the conduct of formal hearings, as are the RMA<sup>262</sup> and the federal APA.<sup>263</sup>

As to proceedings prior to a hearing, the new Florida Act does not expressly require—nor does it prohibit—a pre-hearing conference. One of the twelve ABA recommendations urges the regular use of the pre-hearing conference,<sup>264</sup> and another ABA recommendation calls for abridged procedures where no material factual issue appears.<sup>265</sup> The Administrative Conference of the United States generally supports these recommendations.<sup>266</sup> Perhaps the pre-hearing conference is an implicit part of the hearing provided by the new Florida Act—as a valuable means of determining whether the hearing procedures will be formal or informal, of limiting the issues<sup>267</sup> and of accomplishing the general purposes of the pre-trial conference as it has evolved in the judicial process.

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257. 1961 APA § 120.23.

258. RMA § 9(b).

259. 5 U.S.C. § 554(b) (1970).

260. 1974 APA § 120.57(1) (e).

261. 1961 APA § 120.26.

262. RMA § 9(c).

263. 5 U.S.C. § 556(d) (1970).

264. Recommendation No. 7, *ABA Recommendations*, note 90 *supra*, at 401; *ACUS Statement on ABA Proposals*, note 91 *supra*, at 421; *ACUS Staff Report on ABA Proposals*, note 91 *supra*, at 443.

265. Recommendation No. 9, *ABA Recommendations*, note 90 *supra*, at 405; *ACUS Statement on ABA Proposals*, note 91 *supra*, at 422; *ACUS Staff Report on ABA Proposals*, note 91 *supra*, at 450.

266. See notes 264-65 *supra*, for the ACUS Statements and Staff Reports. The ACUS supports the principle underlying Recommendation No. 9 on abridged procedures, but opposes the manner of implementation proposed by the ABA.

267. For further discussion of the pre-hearing conference with regard to the informal proceeding, see text accompanying and following notes 284-85 *infra*. The Model Rules of Procedure, adopted under the new APA, provide in section 28-5.11(1) that the hearing officer "may conduct one or more pre-hearing conferences." Similarly, the rules of the Division of Administrative Hearings provide in section 22I-2.17 that the division "in its discretion, may, on its own motion or upon request of any party of record, order a pre-hearing conference."

## 5. PARTICIPATION OF NON-PARTIES AT HEARING

When appropriate, the general public may be given an opportunity to present oral or written communications.<sup>268</sup> If the agency proposes to consider the material presented by the public, all parties shall be given an opportunity to cross-examine, challenge or rebut it.

The 1961 Act makes no provision for participation of non-parties. Neither does the RMA nor the federal APA.

## 6. RECORD

The record in formal proceedings shall consist only of the following: (1) all notices, pleadings, motions and intermediate rulings; (2) evidence received or considered; (3) a statement of matters officially recognized; (4) proposed findings and exceptions; (6) any decision, opinion, proposed or recommended order or report by the officer presiding at the hearing; (7) all staff memoranda or data submitted to the hearing officer during the hearing or prior to its disposition after notice of the submission to all parties; (8) all matters placed on the record after an *ex parte* communication; and (9) the official transcript.<sup>269</sup>

Under the 1961 Act,<sup>270</sup> the record consisted of the testimony and exhibits, the recommended order if any, and all pleadings, briefs, and requests filed in the agency proceeding. The federal APA<sup>271</sup> resembles the 1961 Florida Act, while the RMA<sup>272</sup> resembles the more detailed and somewhat more inclusive listing of the new Florida Act.

## 7. RECOMMENDED ORDER

The hearing officer shall submit to the agency and all parties a recommended order, consisting of findings of fact, conclusions of law, interpretations of administrative rules, recommended penalties if applicable, and any other information required by law or agency rule to be contained in the final order.<sup>273</sup> Findings of fact shall be based exclusively on the evidence of record and on matters officially recognized. The agency shall allow each party at least ten days in which to submit written exceptions to the recommended order.

Under the 1961 Act,<sup>274</sup> if the hearing were presided over by a hearing examiner or by a member of the agency, the presiding officer was without authority to render an order, but could render a recommended order to the agency. The recommended order had to include findings of fact. Each party could submit exceptions to the recom-

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268. 1974 APA § 120.57(1)(e). A similar policy is expressed in Public Participation in Administrative Hearings ([ACUS] Recommendation 71-6) 1 C.F.R. § 305.71-6 (1975).

269. 1974 APA § 120.57(1)(f).

270. 1961 APA § 120.24(2).

271. 5 U.S.C. § 556(e) (1970).

272. RMA § 9(e).

273. 1974 APA § 120.57(1)(i).

274. 1961 APA § 120.25(8).

mended order and make oral arguments in support of any such exceptions. Thus, the 1974 Act preserves the same basic approach as its predecessor, but with additional detail and clarity.

As indicated under a previous heading,<sup>275</sup> the 1974 Act's requirement of a recommended order coincides with the requirement of a proposed order where agency action is taken by a formal proceeding, conducted by a hearing officer.

## 8. FINAL ORDER

The agency may accept the recommended order and adopt it as the agency's final order.<sup>276</sup> The agency may reject or modify the conclusions of law and interpretation of administrative rules in the recommended order, but the agency may not reject or modify the findings of fact unless the agency first determines, from a review of the complete record, that the findings of fact were not based upon competent substantial evidence or that the underlying proceedings did not comply with essential requirements of law; any such agency determination shall be stated with particularity in the final order.

The agency may accept or reduce the recommended penalty, but may not increase it without a review of the complete record.

In the event a court, in reversing an agency's order, finds that such agency action was done in bad faith, the court may award attorney's fees and costs to the aggrieved prevailing party.

Under the 1961 Act,<sup>277</sup> the agency clearly was authorized to accept, reject or modify any recommended order. The 1961 Act did not discuss any limitations upon the discretion of the agency, such as those included in the 1974 Act. Neither does the RMA nor the federal APA limit the agency's discretion. Case law, though, has developed the principle that the agency must give some weight to the fact finding of the hearing officer.<sup>278</sup>

## I. *Informal Proceedings*

The 1974 Florida APA breaks new ground by providing informal proceedings.

### 1. WHEN INFORMAL PROCEEDINGS ARE REQUIRED

A party is entitled to an informal proceeding when an agency is determining his substantial interests in a situation where a formal proceeding is not required.<sup>279</sup>

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275. See text accompanying note 209 *supra*.

276. 1974 APA § 120.57(1)(j).

277. 1961 APA § 120.25(8).

278. The leading case is *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

279. 1974 APA § 120.57.



## 2. ELEMENTS OF THE INFORMAL PROCEEDING

When formal proceedings do not apply, various practices are still required of the agency in conducting the informal proceeding.<sup>280</sup>

### a. Notice

The agency must give reasonable notice to affected persons or parties of the agency's action, whether the action is merely proposed or has already been taken, or of its decision to refuse action, together with a summary of the factual, legal and policy grounds therefor.

### b. Right of affected persons or parties to make written or oral presentation—limitation on scope of oral presentation

Affected persons or parties, or their counsel, shall have an opportunity to present to the agency or hearing officer written or oral evidence in opposition to the agency's action or refusal to act or a written statement challenging the grounds upon which the agency has chosen to justify its action or inaction.

The contrast between "written or oral evidence" and a "written statement" calls for comment. The Law Revision Council's draft of the APA revision included a requirement of an opportunity, if feasible, to present oral testimony and argument in lieu of or in addition to written presentations.<sup>281</sup> This was not adopted by the 1974 legislature. The statute as enacted in 1974 mentioned only the written presentation of evidence and argument. The 1975 amendments provide the opportunity to present written or oral evidence, but make no mention of the oral presentation of argument, implying that the oral presentation is limited to evidence and is not available for arguments or other non-evidentiary statements. This implication is difficult to justify on any policy basis, and may well result from a clerical or drafting error in the preparation of the 1975 amendments. Hopefully, the legislature will enact another amendment, to extend the opportunity for oral presentation so as to include argument as well as evidence.

### c. Written statement by agency

If the agency overrules the objections of the persons or parties, it shall provide a written explanation within seven days.

### d. Record

The record in informal proceedings shall consist only of the following: (1) the notice and summary of grounds; (2) evidence received or considered; (3) all written statements submitted by persons and parties; (4) any decision overruling objections; (5) all matters placed on

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280. 1974 APA § 120.57(2).

281. Law Revision draft dated March 1, 1974 § 0120.6(2)(a)(iii) (included as an appendix to Reporter's Comments, note 31 *supra*). The House Bill is identical to the Law Revision draft in this respect. House Bill (*see* note 11 *supra*) § 120.57(2)(a)(iii).

the record after an *ex parte* communication; and (6) the official transcript.

### 3. NEED FOR FURTHER ELABORATION OF THE INFORMAL PROCEEDING

The Act requires the agency to conduct the informal process "in accordance with its rules of procedure."<sup>282</sup> This statutory language appears, on its face, to delegate authority to each agency to adopt procedural rules elaborating upon the informal process. However, as discussed under previous headings,<sup>283</sup> the contents of each agency's procedural rules are controlled by the Administration Commission, which has authority not only to promulgate the Model Rules but also to determine whether or not any agency may be permitted to adopt different rules. Thus, the Administration Commission is, in reality, the recipient of the delegation contained in the Act for elaborating upon the informal process. Elaboration is needed on a number of important points either by rule or by further legislation. Five topics in need of elaboration are discussed in the following illustrative paragraphs.

#### a. Agency staff assistance to persons preparing written presentations

As indicated above, the 1975 amendments provide a limited opportunity for oral presentation. In situations where oral presentation is precluded, and in other situations where it is permitted but not practicable, persons must rely upon written presentations. The written process is likely to be quite satisfactory to some clientele of the agency, but may be grossly inadequate for others, who may be unable to prepare an effective written presentation, and may even be unable to understand the agency's written decision without the aid of an oral explanation.

Administrative justice would be served by a statutory amendment or a provision in the model rules of procedure, providing that agency staff shall be made available to explain the agency's written decision and to assist persons in preparing their written presentations in opposition.

#### b. Recital of rights available to challenge agency action resulting from informal process

The APA requires the agency to give reasonable notice to affected persons of its proposed or completed action. The Act should be read to imply, although it does not so specifically state, that this notice should include a clear recital of the statutory right of affected persons to

282. 1974 APA § 120.57(2)(a).

283. The Model Rules are discussed in text accompanying notes 80-91 *supra*. Procedures for the informal process may be influenced not only by the agency and the Model Rules, but also by the procedural rules of the Division of Administrative Hearings. See note 267 *supra*, and text accompanying note 320 *infra*.

submit evidence and argument in opposition to the agency's decision. In addition, if agency personnel are made available to assist in the preparation of these presentations, their availability should be explained in the same notice. Furthermore, the agency should notify the person of his right to request a formal proceeding or a constitutionally guaranteed "fair hearing," as will be explored later in the article.

The Act further requires the agency to provide a written explanation if it overrules objections. The Act does not specifically state, but again should be read to imply, that this explanation should include a clear recital of the rights available thereafter to challenge the agency's decision.

The APA is ambiguous on some of these matters. These vital questions should be clarified, either by legislation or the Model Rules, and statements of rights should be included in every agency notice and statement resulting from the informal process.

c. Determination whether APA requires  
formal hearing

The APA guarantees a formal hearing to the extent that a disputed issue of material fact is involved. The statutory intent was clearly to make this right available, not only at the beginning of the administrative process, but also at any time during the proceedings if a material fact issue arises.<sup>284</sup> However, the Act does not clarify how the right to a formal hearing shall be determined if a party demands one but the agency insists that the informal process is sufficient.

Under one interpretation, the Act implies that a party should be able to obtain an administrative determination of this question, by the officer whose formal jurisdiction is being invoked—generally a hearing officer. An opposite interpretation would reserve the question for the courts.<sup>285</sup>

If the Act is interpreted as providing for an administrative determination, additional questions arise on the manner in which such a determination shall be made and on the alternatives available to the hearing officer in this situation. Before exploring these questions, a related issue will be discussed—the method of determining, in a specific situation, whether the constitution requires a fair hearing.

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284. The Act requires an agency to give a summary of the factual, legal and policy grounds for its action, in situations where the agency proceeds informally. 1974 APA § 120.57(2)(a)1. See text accompanying note 280 *supra*. Affected persons or parties may then submit written evidence in opposition. 1974 APA § 120.57(2)(a)2. From this dialogue a factual dispute may emerge, requiring conversion of the proceedings from informal to formal, "to the extent that the proceeding involves a disputed issue of material fact." 1974 APA § 120.57.

285. See text accompanying note 247 *supra*. The question involves 1974 APA § 120.68(1): A party who is adversely affected by final agency action is entitled to judicial review. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy. See text accompanying notes 381-85 *infra*.

d. Determination whether constitution requires fair hearing

Case law has recognized, in certain types of situations, the right to a so-called fair hearing as a matter of constitutionally guaranteed due process.<sup>286</sup>

The formal hearing required by the new Florida APA would certainly satisfy the requirements of a fair hearing, but the informal proceeding would not, since its provisions for an oral presentation are limited to the presentation of evidence and do not extend to the presentation of argument. Thus, situations may arise where a party demands a fair hearing, as a matter of constitutional due process, the APA does not require a formal hearing, and the informal process described in the APA does not satisfy the constitutional requirement of a fair hearing.

The APA is silent on this point. Under one interpretation, the agency should expand its informal proceedings, but only to the extent necessary to include the essentials of the fair hearing, in situations where due process requires a fair hearing but the APA does not require a formal hearing. This interpretation would create a type of oral proceeding not described in the APA, which would be conducted by the agency or its personnel, except if the agency voluntarily contracted with the Division of Administrative Hearings to have one of the division's hearing examiners conduct the fair hearing for the agency. A second interpretation would make the *formal* hearing available in all situations where due process requires a *fair* hearing; this formal hearing, like any other, would generally be conducted by a hearing officer.

How should the right to a fair hearing be determined, in the event of a dispute between the agency and a party as to the existence of the right? If the fair hearing were to be conducted by a hearing officer, arguably a hearing officer should determine whether or not such a hearing is required. If, on the other hand, the agency itself were to conduct the fair hearing, it becomes more difficult to justify a threshold determination by a hearing officer. Still another possibility is to reserve the threshold question for the courts.

e. Procedures and alternatives if determination  
is made by hearing officer

The following discussion assumes that a party has demanded a formal or a fair hearing, that the agency has rejected the demand, and that the statute or rules are interpreted to require a hearing officer to determine whether a formal hearing, a fair hearing or no hearing at all is required.

A conference before a hearing officer will evidently be convened,

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286. Fair hearings of various types, appropriate in the respective circumstances, are required in such landmark cases as: *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

in the nature of a pre-hearing conference, at which the officer can receive proffers of evidence and other indications of the matters at issue. The officer should determine, at or immediately after the conference, the threshold question. If he rules that no hearing is needed, the only remaining remedy is judicial review.

If the hearing officer determines that a formal hearing is required, the case should proceed in accordance with the applicable provisions of the APA, subject to any stay orders or other temporary dispositions made by the hearing officer in the interest of justice pending completion of the formal proceedings.

If the hearing officer determines that the APA does not require a formal hearing, but that due process requires a fair hearing, the case should generally be remanded for a fair hearing, to be conducted either by the agency or by a hearing officer, depending on which procedure is provided by the rules and the prevailing interpretation of the APA. In exceptional situations, it could arguably be appropriate for the hearing officer himself to conduct a fair hearing, either at the same time as the pre-hearing conference or in a follow-up proceeding, and to render his own recommended order on the merits.

#### 4. GENERAL COMMENT ON INFORMAL PROCEEDINGS

Neither the 1961 Florida APA, the RMA nor the federal APA provides an informal adjudicatory proceeding. The courts have taken the lead by developing the concept of the fair hearing.<sup>287</sup> Pending efforts to revise the federal APA have noted that the informal process is one of the most important and most difficult of topics.<sup>288</sup>

The 1974 Florida APA, for all its ambiguities and defects, offers an innovative and sound framework for organizing informal adjudication.

### J. Licensing

The new Florida APA adapts many of the RMA provisions on licensing. But the Florida Act goes further than the RMA in creating the right to a hearing on all licensing matters.

#### 1. DEFINITIONS

The Act defines "license" to mean  
a franchise, permit, certification, registration, charter, or

287. *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

288. See Recommendation No. 11, *ABA Recommendations*, note 90 *supra*, at 408; *ACUS Statement on ABA Proposals*, note 91 *supra*, at 423; *ACUS Recommendation No. 72-3, Procedures of the United States Board of Parole*, 25 AD. L. REV. 531 (1973); *Procedures for Discretionary Distribution of Federal Assistance* ([ACUS] Recommendation No. 74-2), 1 C.F.R. § 305.74-2 (1975); Gardner, *The Procedures by Which Informal Action is Taken*, 24 AD. L. REV. 155 (1972); Johnson, *Federal Parole Procedures*, 25 AD. L. REV. 459 (1973); Lockhart, *The Origin and Use of "Guidelines for the Study of Informal Action in Federal Agencies"*, 24 AD. L. REV. 167 (1972); Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293 (1972).

similar form of authorization required by law, but it does not include a license required primarily for revenue purposes when issuance of the license is merely a ministerial act.<sup>289</sup>

"Licensing" means

the agency process respecting the issuance, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment or imposition of terms for the exercise of a license.<sup>290</sup>

These definitions substantially resemble the RMA.<sup>291</sup> The 1961 Florida Act<sup>292</sup> and the federal APA<sup>293</sup> are similar also, except that they do not exclude licenses required primarily for revenue purposes where issuance is merely a ministerial act.

2. LICENSING IS SUBJECT TO PROCEDURES REQUIRED FOR  
DECISIONS WHICH AFFECT SUBSTANTIAL INTERESTS  
UNLESS EXCEPTED BY POST-APA STATUTE

Unless otherwise provided by statute enacted after the effective date of the APA, licensing is subject to the provisions of section 120.57.<sup>294</sup> This section provides for either formal or informal proceedings when an agency determines the substantial interests of a party.<sup>295</sup>

The 1961 Act included licenses in the definition of orders.<sup>296</sup> Thus, licensing was entitled to the same procedures that applied to the formulation of orders. However, this did not result in formal hearings in all cases. The *Bay National Bank* case demonstrates that the courts were not willing to require a formal hearing, either for an order or for a license, unless the courts found that the proceedings constituted a determination of any party's legal rights, duties, privileges or immunities.<sup>297</sup>

The RMA includes licensing within the definition of "contested case," in which the "legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing."<sup>298</sup> Thus, the RMA does not create the right to a hearing in licensing proceedings; it merely provides the manner in which the hearing is conducted, if the hearing is guaranteed by another statute.

The federal APA creates the right to a hearing, at least with regard to applications for licenses, which must be determined by a

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289. 1974 APA § 120.52(7).

290. 1974 APA § 120.52(8).

291. RMA § 1(3), 1(4).

292. 1961 APA § 120.21(5), (6).

293. 5 U.S.C. § 551(8), (9) (1970).

294. 1974 APA § 120.60(1).

295. See text accompanying notes 231-88 *supra*.

296. 1961 APA § 120.21(3).

297. *Bay National Bank & Trust Co. v. Dickinson*, 229 So. 2d 302 (Fla. 1st Dist. 1969), discussed in text accompanying notes 52-55, 75, 237, & 242-43 *supra*.

298. RMA §§ 1(2), 14(a). See generally F. COOPER, note 5 *supra*, at 144-51, 495-99; K.C. DAVIS, note 5 *supra*, §§ 7.18 & 7.19; Note, *Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097 (1973).

formal adjudicatory hearing or other proceedings required by law.<sup>299</sup> Both the RMA<sup>300</sup> and the federal APA<sup>301</sup> provide special procedural protections in connection with the revocation, suspension, annulment or withdrawal of a license. The new Florida Act contains no special recitation on this point, since it declares *all* licensing proceedings to be subject to the procedural safeguards of section 120.57, without differentiating between applications and revocations.

### 3. PROMPT DISPOSITION, WITH STATEMENT OF GROUNDS

When an application for a license has been made as required by law, the agency shall conduct the required proceedings with reasonable dispatch and with due regard to the rights and privileges of all affected parties or aggrieved persons.<sup>302</sup> Each agency, upon issuing or denying a license, shall state with particularity the grounds or basis for the issuance or denial, except where issuance is a ministerial act. If the application is denied without a hearing, the agency shall inform the applicant of any right to a hearing.

If a formal hearing were held, the 1961 APA required the agency to give prompt notification of its decision,<sup>303</sup> though the Act did not compel the agency to reach its decision promptly. No provision of the 1961 Act differentiated licensing from other types of adjudication in this respect or any other.

If a licensing proceeding qualifies as a "contested case" under the RMA, the general provisions applicable to contested cases apply, including the requirement of a final decision containing findings of fact and conclusions of law.<sup>304</sup>

The federal APA requires the agency to set and conduct proceedings "within a reasonable time" upon a license application.<sup>305</sup> Since the proceedings must, in general, be conducted as formal adjudications, the final decision must include findings of fact and conclusions of law.<sup>306</sup>

### 4. EXPIRATION

"When a licensee has made timely and sufficient application for the renewal of a license which does not automatically expire by statute, the existing license shall not expire until the application has been finally acted upon by the agency . . ."<sup>307</sup> If the application is denied or the terms of the license are limited, expiration is extended until the last

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299. 5 U.S.C. § 558(c) (1970).

300. RMA § 14(c).

301. 5 U.S.C. § 558(c) (1970).

302. 1974 APA § 120.60(2).

303. 1961 APA § 120.26(7).

304. RMA §§ 14(a), 12.

305. 5 U.S.C. § 558(c) (1970).

306. 5 U.S.C. §§ 557(c), 555(e) (1970).

307. 1974 APA § 120.60(3).

day for seeking judicial review of the agency order, or until such later date as the reviewing court fixes. No comparable provision on this point was made in the 1961 Act.

The new Florida Act is adapted from the RMA.<sup>308</sup> A similar provision is contained in the federal APA,<sup>309</sup> which, however, extends expiration only until the application has been finally determined by the agency—without mention of a further extension until the last day for seeking judicial review.

## 5. EMERGENCY SUSPENSION

An agency may order summary suspension of a license, if the agency finds that immediate serious danger to the public health, safety, or welfare requires such emergency suspension.<sup>310</sup> The emergency suspension order must include a justification for emergency action, similar to that required in the case of emergency rulemaking. The agency shall promptly institute and act upon formal suspension or revocation proceedings, as a follow up to the emergency suspension of a license. The 1961 Act contained no provision on this point.

The new Florida provision is adapted from the RMA.<sup>311</sup> A somewhat comparable result is produced by the federal APA, which declares that its general procedures for license revocations are applicable "[e]xcept in cases of willfulness or those in which the public health, interest, or safety requires otherwise . . . ."<sup>312</sup>

## K. Hearing Officers

The 1974 Florida APA creates a centralized organization of hearing officers to conduct all formal hearings required by the APA or other law, except in narrowly drawn situations. The 1961 Act authorized the conduct of formal hearings by hearing examiners supplied by the agency "who shall be competent by reason of training or experience."<sup>313</sup> Centralization of the hearing officers is one of the major changes brought about by the new Act. The new system is modeled to some extent upon the federal APA,<sup>314</sup> but even more closely upon the California system.<sup>315</sup>

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308. RMA § 14(b).

309. 5 U.S.C. § 558(c) (1970).

310. 1974 APA § 120.50(5).

311. RMA § 14(c).

312. 5 U.S.C. § 558(c) (1970).

313. 1961 APA § 120.24(1).

314. 5 U.S.C. §§ 3105, 7521, 5362, 3344, 1305 (1970). See generally Dullea, *Development of the Personnel Program for Administrative Law Judges*, 25 AD. L. REV. 41 (1973); Miller, *The Education and Development of Administrative Law Judges*, *id.* at 1; Zwerdling, *Reflections on the Role of an Administrative Law Judge*, *id.* at 9.

315. See note 255 *supra* and accompanying text.



## 1. THE NEW FLORIDA ORGANIZATION OF HEARING OFFICERS

## a. Division of Administrative Hearings

The Act creates the Division of Administrative Hearings within the Department of Administration.<sup>316</sup> The division shall be headed by a director, who shall be appointed by the Administration Commission (Governor and Cabinet) and confirmed by the Florida Senate.

## b. Employment, qualifications and assignment of hearing officers

The division shall employ full-time hearing officers to conduct hearings required by the APA or other law.<sup>317</sup> No person may be employed in this capacity unless he has been a member of The Florida Bar in good standing for the preceding three years. The division may promulgate rules establishing further qualifications for hearing officers. The division shall promulgate rules to establish the procedures by which candidates will be considered for employment, the manner of giving public notice of vacancies in the staff, and the procedures for the assignment of hearing officers.

If the division cannot furnish a division hearing officer promptly in response to an agency request, the director shall designate in writing a qualified full-time employee of an agency, other than the requesting agency, to conduct the hearing.<sup>318</sup> The director shall have discretion to designate a hearing officer who is a qualified full-time employee of an agency, other than the requesting agency, which is located in that part of the state where the parties and witnesses reside.

The director shall have the discretion to designate qualified laypersons to conduct hearings.<sup>319</sup> If a layperson is so designated, the director shall assign a hearing officer to assist in the conduct of the hearing to rule upon proffers of proof, questions of evidence, disposition of procedural requests and similar matters.

## c. Financing the division

Agencies using the services of the division shall pay, on a pro rata basis, for the full cost of administering it. A revolving trust fund is created, into which all agency reimbursements are deposited and from which all expenses of the division are paid. The division is authorized to provide hearing examiners on a contract basis to any governmental entity for conducting any hearing, even if such hearing does not necessitate use of an officer from the division.

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316. 1974 APA § 120.65. See generally Oertel, *Hearings Under the New Administrative Procedure Act*, 49 FLA. B.J. 356 (1975).

317. The 1974 Act provided that the division would "employ or contract for" hearing officers. The 1975 amendments changed this by adding the requirement of full-time employment.

318. The director's authority to designate full-time employees of other agencies to serve as hearing officers was added by the 1975 amendments.

319. The director's authority to designate laypersons as hearing officers was added by the 1975 amendments.

d. Annual report

The director of the division shall issue a written annual report, including a summary of the extent and effect of agencies' utilization of hearing officers, court reporters and other personnel, and his recommendations for change or improvement in the APA or in any agency's practice or policy with respect thereto.

e. Rulemaking

The Act authorizes the division "to adopt reasonable rules to carry out the provisions of this act." The division has adopted rules, significantly dealing with the mechanics of the hearing process, and addressing some of the troublesome areas previously noted in the present article.<sup>320</sup>

2. SCOPE OF JURISDICTION OF DIVISION'S HEARING OFFICERS

The jurisdiction of the division's hearing officers, mentioned under previous headings,<sup>321</sup> includes the conduct of all formal hearings (except those expressly excluded by section 120.57 (1)), all determinations of the validity of a proposed rule, and all determinations of the validity of an existing rule. Arguably, the jurisdiction to conduct formal adjudications includes the jurisdiction to make threshold determinations whether or not a party is entitled to a formal hearing, or a fair hearing, and may even extend to conducting an informal hearing or a fair hearing as a sequel to the threshold determination.<sup>322</sup>

In addition, the division's hearing officers may conduct any hearing for any governmental entity, even if such a hearing is not required by the Act.<sup>323</sup> The original intent was apparently to make the division's hearing officers available to local governments. However, other possibilities come to mind, including the use of hearing officers to assist the Governor in the exercise of his constitutional functions which are not covered by the APA and the use of hearing officers to assist agencies in disposing of matters in informal proceedings (if informal proceedings can be regarded as "hearings" which the division's officers are authorized to conduct under the above-cited provision).

3. THE DIVISION AS AN ENTITY: WILL IT BECOME  
A "SUPER-AGENCY"?

One author has described the Division of Administrative Hearings as a "super-agency,"<sup>324</sup> because its hearing officers have jurisdiction to determine the validity of proposed or existing rules. This observation

320. See notes 267 & 283 *supra* and accompanying text.

321. See text accompanying notes 126-32 (determining validity of proposed rule), 178-89 (determining validity of rule) & 249-55 (formal hearings) *supra*.

322. See text accompanying and following notes 284-86 *supra*.

323. 1974 APA § 120.65(8).

324. Alford, *Administrative Procedure Act*, 48 FLA. B.J. 683, 685 (1974).

leads to the question whether the division will develop the type of collective policy or attitude implied by calling it a "super-agency."

Clearly, the Act does not require or even permit any proceeding to be conducted by more than one hearing officer. Thus, the division cannot function in any formal way as a collegial body sitting en banc. The only way in which the division can function as a "super-agency" is by the development of an informal consensus among its hearing officers, leading to a collective type of decisionmaking in fact, despite the formal requirement that decisions be made by individual hearing officers.

The Act contains no express language on this point, but the intent and spirit can be stated with some confidence. Apparently, the hearing officers within the division are free to discuss pending cases with one another, without making such discussions part of the record<sup>325</sup> and without being bound in any way by the advice of their colleagues, much the same way as the circuit judges within a judicial circuit may exchange ideas about one another's pending cases. The hearing officers, without pressure from the director of the division or anybody else, must of course be permitted to render completely independent decisions, based upon the law, the record, and relevant administrative precedent; again, the judicial analogy is apt.

Hopefully, an attitude of professionalism will build up within the division. It remains to be seen whether, in addition, the hearing officers will formulate collective attitudes toward the issues they are called upon to determine.

#### L. *Ex Parte Communications*

The 1961 Florida APA did not mention *ex parte* communications, although it implied that such communications were prohibited to the extent they impaired the fairness of a formal adjudicatory hearing.<sup>326</sup> The 1974 Act addresses the matter expressly.

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325. See discussion of *ex parte* communications in text accompanying notes 326-44 *infra*.

326. The Florida courts have compiled an uneven record in guaranteeing fair procedures in proceedings governed by the 1961 APA. In *Mack v. State Bd. of Dentistry*, 430 F.2d 862 (5th Cir. 1970), *cert. denied*, 401 U.S. 960 (1971), the Fifth Circuit Court of Appeals in an action under the Civil Rights Act remanded the case for further proceedings by the Board, although the Florida courts had denied relief on the same record when the hearing was challenged in *Mack v. Pepper*, 192 So. 2d 66 (Fla. 3d Dist. 1966), *cert. denied*, 201 So. 2d 551 (Fla. 1967). The fairness of the hearing had been challenged as the attorneys had indulged in continuous personal acrimony, charges, and attacks. The Fifth Circuit declared:

[T]his was not a hearing. It was an ungoverned confrontation. We hold that Dr. Mack, as a matter of fact, has not had a hearing in that sense required of anything which claims to be an administrative hearing as known to the jurisprudence of this Country.

430 F.2d at 864. On the requirement of a fair tribunal, see *Metropolitan Dade County v. Florida Processing Co.*, 229 So. 2d 254 (Fla. 1970). On basic requirements of fairness, see *Robinson v. Board of Pub. Instruction*, 271 So. 2d 784 (Fla. 3d Dist. 1973); *Dade County v. McIntosh*, 256 So. 2d 246 (Fla. 3d Dist. 1972); *Deel Motors, Inc. v. Department of Commerce*, 252 So. 2d 389 (Fla. 1st Dist. 1971); *Ford v. Bay County School Bd.*, 246 So. 2d 119 (Fla. 1st Dist. 1970).

1. PROVISIONS APPLY TO INFORMAL AS WELL AS  
FORMAL PROCEEDINGS

The provisions of the new Florida APA regarding ex parte communications apply to all proceedings, whether formal or informal, affecting the substantial interests of parties, under section 120.57.<sup>327</sup> This coverage is significantly broader than that of the RMA<sup>328</sup> and the federal APA,<sup>329</sup> which deal with ex parte communications only as regards formal hearings. Two of the twelve ABA recommendations for reforming the federal APA deal with ex parte communications, and even these are addressed only to formal hearings.<sup>330</sup>

2. TO WHOM COMMUNICATIONS ARE PROHIBITED

As enacted in 1974, the new APA prohibited ex parte communications, as defined below, from being made to a hearing officer.<sup>331</sup> The 1975 amendments retained this prohibition, and extended it to prohibit, in addition, ex parte communications to an agency head after he has received a recommended order. Agency heads are, moreover, subject to another section of the Act providing for their disqualification for bias, prejudice, interest, or other causes.<sup>332</sup>

The RMA provision on ex parte communications includes communications made to agency heads, subject to some exceptions, as well as to hearing officers.<sup>333</sup> The ABA recommendations would achieve a similar coverage in the federal APA, which currently does not apply to communications made to agency heads.<sup>334</sup>

3. TYPES AND SOURCES OF PROHIBITED COMMUNICATION

The new Florida Act provides that no ex parte communication relative to the merits of the proceeding or threat or offer of reward, shall be made to the hearing officer, or to the agency head after receipt of the recommended order, by any of the following: (a) an agency head or member of the agency or any other public employee or official engaged in prosecution or advocacy in connection with the matter under consideration or a factually related matter; or (b) a party to the proceeding, or any person who directly or indirectly would have a substantial interest in the proposed agency action, or his authorized representative or counsel.<sup>335</sup> The Act states further that it does not

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327. 1974 APA § 120.66(1).

328. RMA § 13.

329. 5 U.S.C. § 554(d) (1970).

330. Recommendations Nos. 3 & 4, *ABA Recommendations*, note 90 *supra*, at 393, 395; *ACUS Statement on ABA Proposals*, Note 91 *supra*, at 420; *ACUS Staff Report on ABA Proposals*, note 91 *supra*, at 433.

331. 1974 APA § 120.66.

332. 1974 APA § 120.71. See text accompanying notes 218-20 *supra*.

333. RMA § 13.

334. See notes 329-30 *supra*.

335. 1974 APA § 120.66(1).

"apply to an advisory staff which does not participate in the proceeding."

The 1974 enactment stated that the prohibition against ex parte communications did not apply to rulemaking, and the 1975 amendments added qualifying language, stating that the prohibition did not apply to "any rulemaking proceedings under section 120.54." This implies that the prohibition against ex parte communications does apply to a section 120.57 proceeding, convened in context of rulemaking at the request of a party who demonstrates that such a proceeding is necessary for the adequate protection of his substantial interests.<sup>336</sup>

The RMA<sup>337</sup> and the federal APA<sup>338</sup> both reserve the possibility of a legitimate ex parte communication in situations authorized by law. The new Florida Act does not contain any such reservation.

The class of persons prohibited from making ex parte communications is more carefully defined in the new Florida Act than in either the RMA or the federal APA. The ABA recommendations to amend the federal APA are comparable to the new Florida Act in this respect.

#### 4. 1975 AMENDMENTS CREATE ANOMALY REGARDING FOLLOW UP TO RECEIPT OF IMPROPER EX PARTE COMMUNICATION

As indicated above, the 1975 amendments extend the prohibition against ex parte communications, so as to prohibit such communications from being made, not only to the hearing officer, but also to the agency head after he has received a recommended order. However, the provisions dealing with the follow up required in the event an improper communication is received were not amended in 1975. These follow up provisions, discussed under the next two headings, continue to read as they were enacted in 1974, mentioning only the hearing officer. Thus, the Act contains an anomaly, by omitting agency heads from the follow up provisions, while including agency heads in the category of persons to whom ex parte communications are prohibited. This anomaly may result from a clerical or drafting error during preparation of the 1975 amendments, or it may reflect a legislative choice which, however, is not readily explainable as a matter of policy. Legislative clarification is required.

#### 5. IF IMPROPER EX PARTE COMMUNICATION IS RECEIVED, IT SHALL BE PLACED ON THE RECORD

Under the new Florida Act, if a hearing officer receives an improper ex parte communication, he shall place on the record of the pending matter all written communications received, a memorandum stating the substance of all oral communications received, all written responses, and a memorandum stating the substance of all oral re-

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336. See text accompanying note 125 *supra*.

337. RMA § 13.

338. 5 U.S.C. § 554(d) (1970).

sponses.<sup>339</sup> He shall advise all parties that such matters have been placed on the record. Any party shall have an opportunity to rebut the ex parte communication. The hearing officer may, if he deems it necessary to eliminate the effect of an ex parte communication received by him, withdraw himself from the proceeding, in which case the Division of Administrative Hearings shall assign a successor.

The RMA does not expressly require that ex parte communications be placed on the record, but an implication to this effect can be read into its requirement that no communication shall be made "except upon notice and opportunity for all parties to participate."<sup>340</sup> The federal APA<sup>341</sup> is similar to the RMA. The ABA recommendations to amend the APA include an express requirement, similar to that in the new Florida Act, for placing ex parte communications on the record.<sup>342</sup>

## 6. SANCTIONS

The 1974 Florida Act states that any person who makes a prohibited ex parte communication and any hearing officer who fails to place any such communication in the record may be assessed a civil penalty not to exceed \$500 or may be subjected to such disciplinary action as his superiors may determine.<sup>343</sup>

Neither the RMA nor the federal APA contains a sanction. The ABA recommendations<sup>344</sup> provide a sanction, which is more severe than the one imposed by the new Florida Act. Upon receipt of an improper ex parte communication, the ABA recommendations provide that the hearing officer (or agency)

may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the person or party [who made the ex parte communication] to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected by virtue of such violation.<sup>345</sup>

Such a provision is designed to have a strong deterrent effect, by warning would-be violators that ex parte communications may be counter-productive. However, the provision confers extremely broad discretion upon the hearing examiner to determine whether in a specific situation the interests of justice require the imposition of this sanction. The new Florida provision provides a sanction independent of the merits of the pending administrative matter and attempts to

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339. 1974 APA § 120.66(2).

340. RMA § 13.

341. 5 U.S.C. § 554(d) (1970).

342. See note 330 *supra*.

343. 1974 APA § 120.66(3). See note 339 *supra*.

344. Recommendation No. 4, *ABA Recommendations*, note 90 *supra*, at 396.

345. *Id.*

cleanse the pending proceeding by having the ex parte communication placed on the record and by permitting the hearing officer to withdraw if he considers it necessary.

### M. *Judicial Review*

The 1974 Florida APA contains more detail on judicial review than is found in either the 1961 Florida Act, the RMA, or the federal APA. Some ambiguity remains, however, requiring further statutory clarification.

#### 1. NEW APA PROVIDES ONLY ONE TYPE OF REVIEW BUT PRESERVES DECLARATORY JUDGMENT JURISDICTION OF CIRCUIT COURTS

The new Act describes one type of judicial review, applicable to all final agency action.<sup>346</sup> Having a single type of review is consistent with the Act's general statement of legislative purpose, reciting an intent to

make uniform the rule making and adjudicative procedures used by the administrative agencies of this state. To that end, it is the express intent of the legislature that the provisions of this act shall replace all other provisions in the Florida Statutes, 1973, relating to rule making, agency orders, administrative adjudication or judicial review, except marketing orders . . . .<sup>347</sup>

In order to resolve disputes which had arisen from the above provisions of the 1974 statute,<sup>348</sup> the 1975 amendments added the following new section:

Nothing in this chapter shall be construed to repeal any provision of the Florida Statutes which grants the right to a proceeding in the circuit court in lieu of an administrative hearing<sup>349</sup> or to divest the circuit courts of jurisdiction to

346. 1974 APA § 120.68(1), (2).

347. Fla. Laws 1974, ch. 74-310, § 3(1).

348. In an order dated March 18, 1975, the Second Circuit (Leon County) granted a motion to dismiss for lack of jurisdiction, apparently on the grounds that the 1974 APA had impliedly repealed the portions of the Declaratory Judgment Act conferring jurisdiction upon the circuit courts to render declaratory judgments on the validity of agency rules. *Jones v. Kennedy*, Case No. 73-1102 (Fla. 2d Cir. Mar. 18, 1975). The present author had reached a similar interpretation of the Act as enacted in 1974, but had heard contrary views vigorously expressed by other commentators. See Levinson, *A Comparison of Florida Administrative Practice under the Old and the New Administrative Procedure Acts*, 3 F.S.U.L. REV. 72, 79 (1975).

349. An example of the circuit court proceeding in lieu of an administrative hearing is found in the Florida Deceptive and Unfair Practices Act, popularly known as the "little FTC Act." After establishing administrative processes for enforcement, the Act provides in Florida Statutes section 501.2091:

Notwithstanding anything in this part to the contrary, any person made a party to any proceeding brought under the provisions of this act by any enforcing authority may obtain a stay of such proceedings at any time by filing a civil action requesting a trial on the issues raised by the enforcing authority in the circuit court in the county of such party's residence. All parties shall be bound by the final order of the circuit court.

render declaratory judgments under the provisions of chapter 36.<sup>350</sup> If any action has been dismissed or otherwise disposed of on the ground that a provision of the statutes granting the right to a trial or the jurisdiction to render declaratory judgments was repealed by . . . [the 1974 APA], such action shall be reinstated by order of the court upon the filing of a petition by the plaintiff at any time during the 60 day period immediately following the effective date of this act.<sup>351</sup>

The 1961 Florida Act provided a variety of possibilities for judicial review: declaratory judgment in the circuit court as to the validity, meaning, or application of any rule;<sup>352</sup> certiorari review in the district court of appeal “[a]s an alternative procedure for judicial review” of the “final orders of an agency entered in any agency proceeding, or in the exercise of any judicial or quasi-judicial authority”;<sup>353</sup> and, “[w]hen appropriate,” mandamus, prohibition or injunction as a means of attacking any “adverse order.”<sup>354</sup> In addition, many statutes dealing with administrative agencies or programs contained their own provisions for judicial review.<sup>355</sup> Three areas present difficulties under the new Act.

a. Does the new APA apply to judicial review of Industrial Relations Commission decisions in workmen’s compensation cases?

The recent Florida Supreme Court decision in *Scholastic Systems, Inc. v. LeLoup*,<sup>356</sup> mentioned under a previous heading,<sup>357</sup> holds that decisions by judges of industrial claims are “quasijudicial,” not “administrative,” and that the appellate review of such decisions by the Industrial Relations Commission is “judicial.” Accordingly, these commission decisions are not regarded as “final agency action” subject to the judicial review provisions of the APA, but instead are subject to certiorari review in the supreme court, on the basis of the constitutional provision that the supreme court “may issue writs of certiorari to commissions established by general law having statewide jurisdiction.”<sup>358</sup> The Workmen’s Compensation Act<sup>359</sup> which was enacted be-

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The effect is to enable a respondent in administrative proceedings for enforcement to opt out of the administrative tribunal and into the circuit court.

350. The reference to chapter 36 is evidently a clerical error in the 1975 amendments. Declaratory judgment jurisdiction of the circuit courts is contained in chapter 86 of the Florida Statutes.

351. FLA. STAT. § 120.73, added by Fla. Laws 1975, ch. 75-191, § 11.

352. 1961 APA § 120.30(1).

353. 1961 APA § 120.31(1).

354. 1961 APA § 120.31(4).

355. A useful compilation, although somewhat out of date even before enactment of the 1974 APA, is found in Hall & Canada, note 2 *supra*, at 1249.

356. 307 So. 2d 166 (Fla. 1974).

357. See text accompanying notes 57-59 *supra*.

358. FLA. CONST. art. V, § 3(b)(3) (1972), revising FLA. CONST. art. V, § 4(2) (1968).

359. FLA. STAT. §§ 440.25(4)(d), .27 (1973).



fore adoption of the APA provided that the supreme court could exercise certiorari review over Industrial Relations Commission decisions, and the court found this statute unaffected by the new APA.

In this writer's view, this decision is unsound. The commission is obviously not a court; it is merely an administrative agency appeals board. Many federal agencies are similarly structured, and the American Bar Association and the Administrative Conference both advocate even more general use of the agency appeals board system, without suggesting that the agencies will thereby become "judicial."<sup>360</sup>

Decisions of the Industrial Relations Commission should be regarded as "final agency action" subject to the judicial review provisions of the new APA, as clarified by the legislative statement of intent quoted above. The constitutional basis of judicial review should be uniform for the review of all agency action under the Act, in conformity with the legislative purpose of achieving uniformity. Evidently, the constitutional authority of the supreme court to issue writs of certiorari to statewide commissions cannot serve as the uniform basis of judicial review under the APA, because the APA extends to many agencies which are not statewide commissions.<sup>361</sup> Another constitutional basis of judicial review can be found, however, and this basis can be applied uniformly in all situations covered by the APA. The 1972 constitutional revision of the Judiciary Article confers upon the supreme court,<sup>362</sup> the district courts of appeal<sup>363</sup> and the circuit courts<sup>364</sup> the power of direct review of administrative action prescribed by general law. The APA implements this constitutional power, conferring jurisdiction generally upon the district courts of appeal, but reserving the possibility that similar jurisdiction can be conferred by other statute upon the supreme court. The Workman's Compensation Statute should therefore be deemed to confer jurisdiction upon the supreme court to exercise direct review of administrative action by the Industrial Relations Commission.<sup>365</sup> This was apparently the

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360. Recommendation No. 6, *ABA Recommendations*, note 90 *supra*, at 400; *ACUS Statement on ABA Proposals*, note 91 *supra*, at 421; *ACUS Staff Report on ABA Proposals*, note 91 *supra*, at 442.

361. 1974 APA § 120.52(1), discussed in text accompanying notes 16-39 *supra*.

362. FLA. CONST. art. V, § 3(b)(7) (1972), *revising* FLA. CONST. art. V, § 4(2) (1968).

363. FLA. CONST. art. V § 4(b)(2) (1972), *revising* FLA. CONST. art. V, § 5(3) (1968).

364. FLA. CONST. art. V, § 5(b) (1972), *revising* FLA. CONST. art. V, § 6(3) (1968).

365. In *Scholastic Systems, Inc. v. LeLoup*, (see note 356 *supra*) the supreme court noted that it had previously afforded "extensive, appellate type review" in workmen's compensation cases, on the basis of the statute (see note 359 *supra*) which provides for review by certiorari. 307 So. 2d at 168. *LeLoup* changed the type of judicial review, without any corresponding change in the statute, and held that "IRC cases shall hereafter be reviewed by this Court upon traditional certiorari grounds based upon a departure from the essential requirements of law, rather than upon general appellate considerations." 307 So. 2d at 173. Thus, at the time of drafting and enacting the 1974 APA (before rendition of the *LeLoup* decision), the draftsmen and legislators understood that the supreme court in fact gave appellate-type review to workmen's compensation cases. It is therefore reasonable to assume that the draftsmen and legislators intended to preserve the same type of review, by implementing the 1972 revision of FLA. CONST. art. V (see notes 362-64 *supra*) providing for direct review of administrative action.

intent of the Law Revision Council.<sup>366</sup> The *LeLoup* decision frustrates this intent, and provides renewed reason for an in-depth legislative inquiry into the unique status which the Industrial Relations Commission has achieved with the aid of the supreme court.<sup>367</sup>

b. Concurrent jurisdiction of circuit courts and administrative tribunals

As indicated above,<sup>368</sup> the 1975 amendments to the APA preserve the jurisdiction of the circuit court, both in proceedings in lieu of an administrative hearing, and in proceedings under the Declaratory Judgment Act. Jurisdiction to render declaratory decisions is consequently shared by the circuit courts with the administrative tribunals exercising declaratory functions under other provisions of the Act, which authorize the agency to make declarations as to the applicability of any statutory provision or of any rule or order of the agency,<sup>369</sup> and which authorize a hearing officer assigned by the Division of Administrative Hearings to render a declaratory determination as to the validity of any proposed or promulgated rule.<sup>370</sup> This concurrent jurisdiction between the circuit courts and the administrative tribunals may encourage forum shopping, which seems inconsistent with the general policy of the APA.

c. Does the Florida Constitution guarantee types of judicial review not detailed in the new APA?

The Florida Constitution confers various types of jurisdiction which could conceivably be invoked as a basis for judicial review of agency action. Reference has already been made to the constitutional provision conferring certiorari jurisdiction on the supreme court over statewide commissions<sup>371</sup> which was relied upon by the supreme court in *Scholastic Systems, Inc. v. LeLoup*,<sup>372</sup> as the basis for the court's review of Industrial Relations Commission decisions. In criticizing *LeLoup*, this article has also referred to other constitutional provisions, which confer the power of direct review of administrative action prescribed by law and has suggested that these provisions have been implemented by the new APA.<sup>373</sup> However, other provisions of the constitution must be considered as potential sources of judicial review of agency action, which could conceivably be invoked independently of the APA.

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366. Reporter's Comments, note 31 *supra*, at 26-27.

367. See text accompanying notes 57-59, 106-12, 249 *supra*.

368. See text accompanying notes 349-51 *supra*.

369. See notes 174-77 *supra* and accompanying text.

370. See notes 126-32 *supra* (proposed rule), & 178-81 *supra* (promulgated rule) and accompanying text.

371. See note 358 *supra* and accompanying text.

372. 307 So. 2d 166 (Fla. 1974).

373. See text accompanying notes 362-67 *supra*.

The constitution preserves the jurisdiction of the supreme court, district courts of appeal, and circuit courts to issue prerogative writs, including habeas corpus, mandamus, quo warranto, certiorari, prohibition, and all writs necessary to the complete exercise of their respective jurisdictions.<sup>374</sup> Further, the constitution confers upon the circuit courts "original jurisdiction not vested in the county courts."<sup>375</sup> It could be argued that the "original jurisdiction" of the circuit courts, or the prerogative writ jurisdiction of the supreme court, district courts of appeal, and circuit courts may support the exercise of jurisdiction in disputes arising out of administrative action, without regard to the APA. This interpretation, if followed, could lead to the by-passing of the APA and its replacement by prerogative writ actions or common law actions, in courts selected by litigants.

A preferable interpretation would make a distinction between direct and collateral review of administrative action. Direct review can, under this interpretation, be authorized solely by legislation, in order to give effect to the constitutional grant of power of "direct review of administrative action prescribed by general law." The only relevant legislation is the new APA, and its provisions on judicial review are therefore exclusive.<sup>376</sup> On the other hand, collateral (or indirect) review remains available pursuant to the constitutional grants of the "original jurisdiction" of the circuit courts and the prerogative writ jurisdiction of the circuit and higher courts.

The "original jurisdiction" of the circuit courts supports the statutory grant of jurisdiction, under the 1975 APA amendments, to render declaratory judgments on the validity, meaning, or application of a rule, if such judgments are considered not to be "direct review."

In addition, the prerogative writ jurisdiction of the circuit and higher courts appears to permit the courts to exercise a safety valve function, by way of collateral review, in the unlikely event that the direct review provisions of the APA do not provide an adequate remedy. Hopefully, the courts will exercise great restraint so as to discourage forum shopping or the deliberate by-passing of the APA.

The RMA provides for a declaratory judgment in the district court of the county (or other appropriate court) on the validity or applicability of a rule "if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff."<sup>377</sup> The RMA also provides for proceedings for review in the district court of the county

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374. FLA. CONST. art. V, §§ 3(b)(4)-(6) (Supreme Court); 4(b)(3) (District Courts of Appeal); 5(b) (Circuit Courts) (1972), *revising* FLA. CONST. art. V, §§ 4, 5, 6 (1968).

375. FLA. CONST. art. V § 5(b) (1972), *revising* FLA. CONST. art. V § 6(3) (1968).

376. Pursuant to the 1975 amendments, the APA provisions on judicial review incorporate by reference other statutes, dealing respectively with circuit court proceedings in lieu of administrative hearings, and circuit court jurisdiction to render declaratory judgments. *See* note 351 *supra* and accompanying text.

377. RMA § 7.

(or other appropriate court) regarding the final decision in a contested case, that is, a formal adjudication. The RMA states that this provision "does not limit the utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law."<sup>378</sup>

The federal APA provides for judicial review by any special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.<sup>379</sup>

However, the judicial review provisions of the federal APA do not apply to the extent statutes preclude judicial review, or where agency action is "committed to agency discretion by law."<sup>380</sup>

## 2. STANDING, TIMING

Under the 1974 Florida APA, a party who is adversely affected by final agency action is entitled to judicial review.<sup>381</sup> A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

As noted previously, the 1961 Florida APA dealt separately with declaratory judgments on rules and with judicial review of agency orders. The declaratory judgment as to the validity, meaning or application of a rule could be sought by "any affected party."<sup>382</sup> The 1961 Act contained no description of the standing needed to seek judicial review of a final agency adjudicatory order, and no reference was made to interlocutory review.

The RMA, like the 1961 Florida Act, deals separately with declaratory judgments on rules and with judicial review of agency orders. The declaratory judgment on the validity or applicability of a rule may be sought by a plaintiff who alleges that the rule interferes with or impairs his legal rights or privileges, or threatens to do so.<sup>383</sup> Review of final agency action in a contested case can be sought by "a person who has exhausted administrative remedies available within the agency and who is aggrieved by a final decision."<sup>384</sup> The RMA

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378. RMA § 15(a).

379. 5 U.S.C. § 703 (1970).

380. 5 U.S.C. § 701(a) (1970).

381. 1974 APA § 120.68(1).

382. 1961 APA § 120.30(1).

383. RMA § 7.

384. RMA § 15(a). On judicial review of state administrative action in general, see Friedman, *Implications for the Future in State Court Review of Administrative Decisions*, 26 AD. L. REV. 87 (1974); Schotland, *Judicial Review of State Administrative Action*, 26 AD. L. REV. 93 (1974).

includes a provision on interlocutory review, identical to that in the new Florida APA.

The federal APA states:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.<sup>385</sup>

### 3. FORUM, FORM OF ACTION, PROCEDURE

Except in matters for which judicial review by the supreme court is provided by law, the 1974 Florida APA provides that all proceedings for judicial review shall be instituted by filing a petition in the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides.<sup>386</sup> Review proceedings shall be conducted in accordance with the Florida Appellate Rules.

As previously noted, the 1961 Florida APA provided for declaratory proceedings in the circuit courts regarding rules,<sup>387</sup> certiorari review in the district courts of appeal "as an alternative procedure for judicial review" of adjudicatory orders,<sup>388</sup> and, "when appropriate," mandamus, prohibition or injunction to attack "an adverse order."<sup>389</sup> Certiorari proceedings in the district courts of appeal were conducted pursuant to the Florida Appellate Rules. Venue was in the appellate district wherein hearings before the hearing officer or agency were conducted or if venue could not be thus determined, where the agency's executive offices were located.

The RMA provides that petitions for review may be filed in the district court of the county (or other appropriate court); the court shall sit without a jury.<sup>390</sup> No further details are included regarding venue or procedure.

At the time of writing this article, the Florida Appellate Rules do not contain adequate provisions regarding judicial review under the new APA, as they provide only certiorari review. Amendment of the rules is required.

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385. 5 U.S.C. §§ 702, 704 (1970).

386. 1974 APA § 120.68(2).

387. See note 352 *supra*.

388. See note 353 *supra*.

389. See note 354 *supra*.

390. RMA § 15(b), (f).

#### 4. TEMPORARY RELIEF

"The filing of the petition [for review] does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms."<sup>391</sup>

The 1961 Act provided:

When supersedeas is not otherwise provided for, any such ruling or order of an agency, may in appropriate cases, be superseded upon an application for supersedeas showing good cause therefor, made to the agency, or the court. If the order has the effect of suspending or revoking a license, supersedeas shall be granted, as of right, upon such conditions as shall be reasonable, and in any event the order granting supersedeas shall specify the conditions upon which supersedeas is granted.<sup>392</sup>

The RMA<sup>393</sup> is identical to the new Florida Act. Similar provisions appear also in the federal APA.<sup>394</sup>

#### 5. RECORD FOR JUDICIAL REVIEW

Judicial review shall be confined to the record.<sup>395</sup> In the review of formal or informal proceedings under section 120.57, the record shall consist of the items listed in that section as constituting the record, together with the agency's written document expressing its order and underlying reasons.

In the review of rulemaking proceedings, the record shall consist of the materials which were considered by the agency, together with the agency's written document expressing its action and the underlying reasons.

In the review of a declaratory statement by an agency, as to the applicability of any statutory provision or of any rule or order of the agency, and in the review of situations where there has been no proceeding under either the rulemaking or adjudicatory provisions, the record shall consist of the agency's written document expressing its action and any other documents identified by the agency as having been considered by it and used as a basis for its action.

If the reviewing court remands for additional agency determinations pending completion of judicial review, the record of such additional agency action is incorporated into the record.

The 1961 APA contained no similar provision. The RMA contains no description of the record in declaratory judgment proceedings on rules. The Act deals briefly with the record in judicial review of contested cases. The agency shall transmit its entire record to the

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391. 1974 APA § 120.68(3).

392. 1961 APA § 120.31(3).

393. RMA § 15(c).

394. 5 U.S.C. § 705 (1970).

395. 1974 APA § 120.68(4).

reviewing court. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be "taxed" by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record. Judicial review shall be confined to the record, but in cases of alleged irregularity in procedure before the agency, not shown in the record, proof thereon may be taken in the court.<sup>396</sup>

Although the federal APA requires the reviewing court to "review the whole record or those parts of it cited by a party,"<sup>397</sup> the Act does not describe the contents of the record.

#### 6. COURT SHALL DEAL SEPARATELY WITH PROCEDURE, LAW, FACT AND POLICY

The 1974 Florida APA requires the reviewing court to deal separately with disputed issues of agency procedure, interpretations of law, determinations of fact, and policy within the agency's exercise of delegated discretion.<sup>398</sup> The Act includes separate standards of review for each of these matters, which will be discussed under the next heading.

Administrative law practice has developed varying standards of review, depending on whether the disputed issue is one of law, fact, and so on.<sup>399</sup> The development of these standards has implied the need of the reviewing court to devote separate attention to each type of issue, so that the appropriate standard of review can be applied to each type.

The new Florida APA clarifies the need to deal separately with procedure, law, fact and policy, so that the appropriate standard of review can be applied to each. This clarification is one of the significant innovations of the Act and is not found in either the 1961 Florida APA, the RMA, or the federal APA.

#### 7. STANDARDS OF REVIEW

##### a. The 1974 Florida APA

The following standards of judicial review are set forth in the new Act.

##### (1) Agency procedure

The court shall remand the case for further agency action if it finds that either the fairness of the proceedings or the correctness of the

396. RMA § 15(d), (f).

397. 5 U.S.C. § 706 (1970).

398. 1974 APA § 120.68(7).

399. See generally 4 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE 114-270 (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 546-653 (1965). The distinctions are implied in *State ex rel. Vining v. Florida Real Comm'n*, 281 So. 2d 487 (Fla. 1973); *Schreiber Express, Inc. v. Yarbrough*, 257 So. 2d 245 (Fla. 1971).

outcome may have been impaired by a material error in procedure or a failure to follow prescribed procedure. An agency's failure to comply with the requirements as to public access to its rules, orders, and index shall be presumed to be a material error in procedure.<sup>400</sup>

(2) Agency interpretation of law

"The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action," or the court shall remand the case to the agency for further action under a correct interpretation of the law.<sup>401</sup>

(3) Agency finding of fact

The court shall set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record. However, the court shall not substitute its judgment for that of the agency as to the weight of the evidence in any formal or informal proceeding under section 120.57.<sup>402</sup>

(4) Agency exercise of discretion

The court shall remand the case to the agency if it finds the agency's exercise of discretion to be outside the range of discretion delegated to the agency by law; to be inconsistent with an agency rule, an officially stated agency policy, or a prior agency practice if deviation therefrom is not explained by the agency; or otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of an agency on an issue of discretion.<sup>403</sup>

b. Other administrative procedure acts

Other acts contain standards of review in different degrees of detail. The accompanying footnotes set forth the provisions of the 1961 Florida APA,<sup>404</sup> the RMA,<sup>405</sup> and the federal APA.<sup>406</sup> By comparison,

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400. 1974 APA § 120.68(8).

401. 1974 APA § 120.68(9).

402. 1974 APA § 120.68(10).

403. 1974 APA § 120.68(12).

404. In declaratory actions on rules, the 1961 Act stated that, in addition to any other ground, a rule should be declared invalid for a "substantial failure to comply with the provisions of this chapter, or in the case of an emergency rule, upon the ground that the facts recited in this statement do not constitute an emergency." 1961 APA § 120.30(2).

In certiorari review of adjudicatory orders, the 1961 Act required the district court of appeal to accomplish the following objectives:

to accord the parties due process of law; to establish a sufficient record, for review; to accord the parties their constitutional, statutory or procedural rights; and to accomplish the purposes and objectives of the law pursuant to which the administrative proceeding was initiated.

1961 APA § 120.31(2).

Peden v. State Bd. of Funeral Directors and Embalmers, 189 So. 2d 526 (Fla. 3d Dist.



the new Florida APA reaches a superior level of clarity and may therefore lead to greater consistency and predictability in the outcome of judicial review.

#### 8. TYPES OF RELIEF

The reviewing court's decision may be mandatory, prohibitory, or declaratory in form, and it shall provide whatever relief is appropriate, irrespective of the original form of the petition. If the court sets aside agency action or remands to the agency for further proceedings, the court may make such interlocutory order as is necessary to preserve the interests of any party and the public pending further proceedings or agency action.<sup>407</sup>

The 1961 Act provided that, where certiorari was granted, the court could issue its mandate or order with directions to the agency to enter such order in the proceedings as was appropriate on the record, or the court might remand the cause for further proceedings, including the taking of testimony. Also, a party might attack an agency order by mandamus, prohibition or injunction and could secure the types of relief appropriate under those writs.<sup>408</sup>

The RMA authorizes the court to affirm, remand, reverse or modify the agency's decision and to order a stay of enforcement of the agency's decision on appropriate terms pending final disposition in the courts.<sup>409</sup>

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1966), noted that the substantial evidence rule was one of the standards implicit in the certiorari form of review, that the 1961 APA did not deal with this topic, and that the court would therefore follow the substantial evidence rule as announced in the leading pre-1961 case of *De Groot v. Sheffield*, 95 So. 2d 912 (Fla. 1957). *See also* *Schreiber Express, Inc. v. Yarborough*, 257 So. 2d 245 (Fla. 1971); Author's Comment, FLA. APP. R. 4.1, in 32 FLA. STAT. ANN. The supreme court has recently suggested that the substantial evidence rule is required as a matter of due process. *Buchman v. State Bd. of Accountancy*, 300 So. 2d 671 (Fla. 1974).

405. The RMA contains no standards for review in declaratory actions on rules. Regarding review of contested cases, the RMA provides:

The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

RMA § 15(g).

406. The federal APA requires the reviewing court to: decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case . . . reviewed on the record . . . or (F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

5 U.S.C. § 706 (1970).

407. 1974 APA § 120.68(13).

408. 1961 APA § 120.31(2), (4).

409. RMA § 15(c), (g).

The federal APA authorizes the court to issue a stay to postpone the effective date of the agency action, but the Act does not discuss the type of ultimate relief<sup>410</sup>—nor does it specify the form of action, since this matter is dealt with by other statutes.

#### 9. PRESUMPTION OF VALIDITY OF AGENCY ACTION

Unless the court finds a ground for setting aside, modifying, remanding, or ordering agency action or ancillary relief under a specified provision of this section of the Act, the court shall affirm the agency's action.<sup>411</sup>

The courts have traditionally recognized a presumption in favor of the validity of administrative action,<sup>412</sup> but this presumption was not spelled out in the 1961 APA. Nor is it mentioned in the RMA or the federal APA. The new Florida APA serves a valuable clarifying function in this regard.

#### N. *Enforcement of Agency Action*

The new Florida APA includes an innovative provision, not found in the 1961 Florida APA, the RMA, or the federal APA, on the enforcement of agency action.

##### 1. PETITION FOR ENFORCEMENT, FILED IN CIRCUIT COURT BY AGENCY

Except as otherwise provided by statute, any agency may seek enforcement of its action by filing a petition in the circuit court where the subject matter of the enforcement is located.<sup>413</sup>

This writer would prefer to see the enforcement power vested in the district courts of appeal, rather than in the circuit courts. The judicial review provisions of the APA confer jurisdiction upon the district courts of appeal to decide cases brought *against* an agency by an affected party seeking review. It seems anomalous that the enforcement provisions of the same Act require the circuit courts to decide cases brought *by* an agency against an affected party seeking enforcement, in which the same types of issue are likely to arise.<sup>414</sup> By having one level of courts decide petitions against the agency and another level of courts decide enforcement actions by an agency, the Act increases the possibility of inconsistent patterns of decisions from court to court and the related possibility that parties will attempt to maneuver their cases into one set of courts or the other, depending on their perception as to where their chances of success are greater. These

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410. 5 U.S.C. § 705, (1970).

411. 1974 APA § 120.68(14).

412. See generally sources cited in note 399 *supra*. The presumption of validity of administrative action is suggested in State *ex rel.* Siegendorf v. Stone 266 So. 2d 345 (Fla. 1972).

413. 1974 APA § 120.69(1)(a).

414. See text accompanying notes 419-20 *infra*.

possibilities, however, are reduced by some of the other provisions which will soon be discussed.

The circuit courts admittedly offer some advantages as vehicles for enforcement. These courts are more numerous and provide geographical convenience. Further, they are accustomed to conducting trial-type proceedings, which may be needed in some enforcement actions, for example, to resolve disputes as to whether or not the defendant has already complied with the agency's order. Yet if the district courts of appeal had jurisdiction over enforcement actions, they could accomplish similar results by appointing special masters when necessary.

## 2. PETITION FILED BY ANY SUBSTANTIALLY INTERESTED PERSON

A petition for enforcement may be filed by any substantially interested person who is a resident of the state. However, no such action may be commenced if the agency has filed and is diligently prosecuting a petition for enforcement, nor may the action be commenced until sixty days after the petitioner has given notice of violation of agency action to the head of the agency concerned, the attorney general, and any alleged violator.

"A petition for enforcement by a non-governmental person shall be in the name of the State of Florida on the relation of the petitioner," and the outcome shall bind the state. The agency whose action is sought to be enforced may intervene as a matter of right.<sup>415</sup>

The purpose of this provision is to permit citizens to compel enforcement, even if the agency does not. This does not mean that citizens can compel the agency to initiate proceedings against an alleged violator; it means only that, once the agency's proceedings have culminated in final agency action, citizens can compel enforcement.

## 3. TYPE OF RELIEF

A petition for enforcement may request declaratory relief; temporary or permanent equitable relief; any fine, forfeiture, penalty or other remedy provided by statute; any combination of the foregoing; or, in the absence of any other specific statutory authority, a fine not to exceed \$1,000.<sup>416</sup>

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415. 1974 APA § 120.69(1)(b). Federal legislation in the consumer field, providing for citizen enforcement if the agency fails to act, is mentioned as analogous to the new Florida provision in Kennedy, *A National Perspective of Administrative Law and the Florida Administrative Procedure Act*, 3 F.S.U.L. REV. 65, 70-71 (1975). See also the Florida Environmental Protection Act, FLA. STAT. § 403.412(2) (1973).

416. 1974 APA § 120.69(2). See *Civil Money Penalties as a Sanction* ([ACUS] Recommendation No. 72-6) 1 C.F.R. § 305.72-6 (1975); Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974).

#### 4. DOUBLE JEOPARDY

After the court has rendered judgment on a petition for enforcement, no other petition shall be filed or adjudicated against the same defendant on the basis of the same agency action, or with regard to the same transaction or occurrence, unless expressly authorized on remand.<sup>417</sup>

#### 5. CONSOLIDATION OF MULTIPLE PROCEEDINGS

If one or more petitions for enforcement and a petition for review involving the same agency action are pending at the same time, the court considering the review petition may order all such actions transferred to and consolidated in one court. Each party shall be under an affirmative duty to notify the court when he becomes aware of multiple proceedings.<sup>418</sup>

This provision permits the district court of appeal, in which a review petition is pending, to consolidate that proceeding with any petitions for enforcement then pending in the circuit courts, thus tending to reduce multiple proceedings. It may also give the respondent in enforcement proceedings in circuit court an opportunity to seek another forum. While the circuit court case against him is pending, he may file a petition for review in the district court of appeal if his dispute with the agency is one which could properly be determined on a petition for review. He may then seek consolidation of the cases, and may be able to convince the district court of appeal that it should remove the enforcement action from the circuit court for consolidation with the petition for review in the district court of appeal. This opportunity for forum shopping is one of the consequences of the provision, criticized above, which confers enforcement jurisdiction on the circuit courts while review jurisdiction is vested in the district courts of appeal.

#### 6. DEFENSES TO ENFORCEMENT PETITIONS

In any enforcement proceeding the respondent may assert as a defense the invalidity of any relevant statute, the inapplicability of the administrative determination to respondent, compliance by the respondent, the inappropriateness of the remedy sought by the agency, or any combination of the foregoing. In addition, if the petition for enforcement is filed during the time within which the respondent could petition for judicial review of the agency action, the respondent may assert [as a defense to the enforcement petition] the invalidity of the agency action.<sup>419</sup>

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417. 1974 APA § 120.69(3).

418. 1974 APA § 120.64(4)(b).

419. 1974 APA § 120.69(5).

The latter sentence causes the respondent who declines to comply with agency action, and waits for an enforcement action, to lose his opportunity to raise an important type of defense—the invalidity of the agency action. He retains his opportunity to raise this defense if an enforcement action is filed during the time within which he could petition for review, since he is not deemed to have waived this defense until expiration of his time for filing a petition for review.

The underlying assumption is that a party who wants judicial review of agency action should carry the burden of initiating a petition for review, rather than defy the agency and await enforcement action. This provision encourages parties to initiate petitions for review, by depriving them of an important defense if they fail to seek review and are later subjected to enforcement proceedings. In some situations the results may be harsh, and may even raise questions of due process such as whether a defendant can be deemed to have waived an otherwise meritorious defense by his failure to initiate an available method of review. However, the basic policy is supportable on the theory that the action of an administrative agency is legally binding, although subject to review, and therefore the citizen should comply with the agency or initiate an orderly challenge.<sup>420</sup>

#### 7. EMERGENCY ENFORCEMENT

[U]pon receipt of evidence that an alleged violation of an agency's action presents an imminent and substantial threat to the public health, safety or welfare, the agency may bring suit for immediate temporary relief in an appropriate circuit court, and the granting of such temporary relief shall not have res judicata or collateral estoppel effect as to further relief sought under a petition for enforcement relating to the same violation.<sup>421</sup>

#### 8. COSTS AND ATTORNEY'S FEES

In any final order on a petition for enforcement the court may award to the prevailing party all or part of the costs of the litigation and reasonable attorney's fees and expert witness fees, whenever the court determines that such an award is appropriate.<sup>422</sup>

This provision has multiple consequences. First, it is an additional encouragement to a party to initiate a petition for review, rather than defy the agency and await enforcement, since the latter course subjects the party to the risk of paying costs, attorney's fees and

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420. See generally Levinson, *Enforcement of Administrative Decisions in the United States and France, Part I*, 23 EMORY L. J. 11, 16-24, 59-74, 94-96 (1974).

421. 1974 APA § 120.69(6).

422. 1974 APA § 120.69(7).

witness fees to the agency if he loses the enforcement action and the court determines such an award is appropriate. Second, it encourages substantially interested persons to file petitions for enforcement of agency action where the agency itself has not done so, since these persons have an opportunity to recover their costs and attorney's and witness fees if they prevail. Third, it discourages the filing of frivolous petitions for enforcement either by the agency or by substantially interested persons.

#### O. *Administrative Procedures Committee of Legislature*

The 1974 APA establishes the Administrative Procedures Committee of the legislature. No similar body is contemplated in either the 1961 Florida APA, the RMA or the federal APA.

##### 1. CREATION OF COMMITTEE; MEMBERSHIP

The Administrative Procedures Committee is created as a standing joint committee of the legislature. The committee consists of six members, of whom three are appointed by the speaker of the house and three by the president of the senate. One appointee from each chamber shall be a member of the minority party. The president of the senate shall appoint the chairman in even years and the vice-chairman in odd years and the speaker shall appoint the chairman in odd years and the vice-chairman in even years. Members shall serve without additional compensation.<sup>423</sup>

##### 2. COMMITTEE FUNCTIONS

The committee shall maintain continuous review of the statutory authority on which each administrative rule is based. The committee shall review proposed administrative rules, making any appropriate objections, as has been discussed earlier, and shall "generally review agency action pursuant to chapter 120 and the operation of the administrative procedure act." The committee shall report to the legislature at least annually and recommend needed legislation or other appropriate action.<sup>424</sup>

##### 3. ORGANIZATION AND STAFF

The committee shall adopt rules necessary for its own organization and operation and for that of its staff. It shall appoint an executive director and general counsel and shall have general administrative responsibility for the operations of its staff.<sup>425</sup>

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423. Fla. Laws 1974, ch. 74-310, § 2, *creating* FLA. STAT. § 11.60(1) (Supp. 1974); Lewis, *The Role of the Joint Legislative-Administrative Procedures Committee*, 3 F.S.U.L. REV. 82 (1975).

424. Fla. Laws 1974, ch. 74-310, § 2, *creating* FLA. STAT. § 11.60(2) (Supp. 1974).

425. Fla. Laws 1974, ch. 74-310, § 2, *creating* FLA. STAT. § 11.60(3) (Supp. 1974).

P. *Miscellaneous Matters*

1. TRANSITIONAL PROVISION—ADJUDICATIVE  
PROCEEDINGS

All administrative adjudicative proceedings which began before the effective date of the Act shall continue to conclusion under prior law, except that proceedings which have not yet progressed to the stage of a hearing may, with the consent of all parties and the agency involved, be conducted in accordance with the new Act, as nearly as feasible.<sup>426</sup>

2. PUBLIC SERVICE COMMISSION—INTERIM  
RATE PROVISIONS

[P]ublic utilities and companies regulated by the public service commission shall be entitled to proceed under the interim rate provisions of chapter 364, Florida Statutes, or the procedures for interim rates contained in Committee Substitute for House Bill 1542 of the 1974 legislative session, or as otherwise provided by law.<sup>427</sup>

3. TRANSITIONAL PROVISION—RULES

Upon petition of any person substantially affected, any agency shall initiate rulemaking proceedings within ninety days of the petition in order to review any rule which was adopted without a public hearing before the effective date of the Act. If the agency fails to initiate rulemaking within ninety days after a petition has been filed, operation of the rule shall be suspended. Even without any petition being filed, all rules which were adopted without a public hearing before the effective date of the Act shall become void on October 1, 1975. All existing rules must be indexed by January 1, 1975.<sup>428</sup>

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426. Fla. Laws 1974, ch. 74-310, § 3(2). In *Lewis v. Judges of the Dist. Court of Appeal*, No. 47,063 (Fla. July 17, 1975) the supreme court held that the "entire process of granting new bank charters from initial application to final approval," was an "administrative adjudicative proceeding" within the meaning of the portion of the 1961 APA dealing with adjudication, and was therefore incorporated within the transitional provision of the 1974 Act, which preserved prior law as to "administrative adjudicative proceedings" begun before the effective date of the new Act. Having characterized the bank chartering process as an "administrative adjudicative proceeding" for purposes of determining that prior law was applicable to a process which had begun before the effective date of the 1974 APA, the court then followed prior case law under the 1961 APA, and characterized the process as "quasi-executive" for purposes of determining the availability of judicial review. The court held that certiorari review by the district court of appeal was unavailable under prior case law, with regard to "quasi-executive" actions such as the processing of bank charter applications. The district court was therefore prohibited from considering an applicant's petition for certiorari. The court indicates that its treatment of "quasi-executive" actions is limited to cases arising under the 1961 APA and that the 1974 revision has significantly changed the law with regard to proceedings arising under the new Act.

427. Fla. Laws 1974, ch. 74-310, § 3(3).

428. Fla. Laws 1974, ch. 74-310, § 3(4).

#### 4. REPEAL

The prior Administrative Procedure Act is repealed.<sup>429</sup>

#### 5. SEVERABILITY

The Act contains a severability clause, in the event any provision of the Act or the application thereof is held invalid.<sup>430</sup>

#### 6. EFFECTIVE DATES

October 1, 1974, was the effective date of the provisions dealing with the Model Rules of Procedure, creation of the Division of Administrative Hearings, and creation of the Administrative Procedures Committee.<sup>431</sup> The remainder of the 1974 Act became effective on January 1, 1975. The 1975 amendments took effect on June 26, 1975.

### III. SUMMARY AND CONCLUSIONS

The 1974 Florida APA is the combined work product of the Law Revision Council, its reporter, the members and staff of legislative committees, the national experts who met during the brainstorming session in Washington, and various members of the bar and others who appeared at public hearings to discuss the drafts of the APA. The Governor generally supported the notion of APA revision, without becoming involved in details. Academicians as well as practitioners contributed to its development. The final product resulted from compromise in a conference committee.<sup>432</sup> The entire process was relatively short. The bill was signed into law less than one year after the work had started on the first draft.

The new Act is a significant improvement, not only on the 1961 Florida APA, but also on the RMA and, to the extent comparable, the federal APA. The Act may well point the way, together with recent legislation from other states, toward the future of administrative law.<sup>433</sup>

The major accomplishments of the 1974 Florida APA, and the major criticisms and suggestions by this author, are summarized under the following headings, which correspond to those used in the text of this article.

#### A. Coverage and Exemptions<sup>434</sup>

The Act covers an expanded range of agencies and functions and permits the Administration Commission to confer temporary exemptions.

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429. Fla. Laws 1974, ch. 74-310, § 4.

430. Fla. Laws 1974, ch. 74-310, § 5.

431. Fla. Laws 1974, ch. 74-310, § 6.

432. See notes 7-13 *supra* and accompanying text.

433. Current developments in some other states are noted in note 4 *supra*. The significance of the new Florida APA on the national scene is suggested in the articles by Carrow, note 9 *supra*, and Kennedy, note 415 *supra*.

434. See text accompanying notes 14-75 *supra*.



\* The Governor's constitutional functions, excluded by the Act, should be studied, for possible regularization by executive order.

\* The administrative functions of public corporations and local governments should be studied, for possible coverage in the APA, in modified form if appropriate.

#### B. *Procedural Rules (Including Model Rules)*<sup>435</sup>

The Act requires the Administration Commission to adopt model rules and to determine agency requests for variance.

\* Additional clarification is required, regarding the commission's authority to amend the model rules and regarding their permissible subject-matter.

#### C. *Rulemaking*<sup>436</sup>

Notice-and-comment rulemaking is adopted as the basic procedure. The proceeding is quasi-legislative, unless a party demands a trial-type proceeding if necessary to protect his substantial interests. Any substantially affected person may seek a determination by a hearing officer of the validity of a proposed or existing rule. The Administrative Procedures Committee shall determine whether each proposed rule is within the statutory authority of the agency, whether the rule is in proper form, and whether the agency gave adequate notice, but the committee's disapproval does not nullify the effectiveness of the proposed rule.

\* The total package of controls on rulemaking may be too cumbersome to work effectively.

\* The Act adopts the questionable policy of excluding the Industrial Relations Commission from the rulemaking provisions.

\* The Act does not clearly indicate whether the hearing officer may conduct an informal proceeding to determine the validity of a proposed or existing rule, in the event that no disputed issue of material fact is involved.

#### D. *Public Access and Publication*<sup>437</sup>

The Act guarantees public access to rules, orders and a subject-matter index of each. The Florida Administrative Weekly is established, in addition to the Florida Administrative Code.

\* No protection is given to the confidentiality of financial, medical and other types of information in which a party to agency proceedings may have a legitimate claim to privacy.

#### E. *Declaratory Statements*<sup>438</sup>

Agencies are required to provide, by rule, for declaratory statements on the applicability of any statute, rule or order. As a separate

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435. See text accompanying notes 76-91 *supra*.

436. See text accompanying notes 92-156 *supra*.

437. See text accompanying notes 157-73 *supra*.

438. See text accompanying notes 174-89 *supra*.

matter, a declaratory statement on the validity of a proposed or existing rule is available from a hearing officer.

\* As indicated above, the Act does not specify whether the informal proceeding may be used in making such determinations if no disputed issue of material fact is involved.

#### F. *Toward Administrative Stare Decisis*<sup>439</sup>

A combination of provisions requires the agency to follow its own precedent or explain the reasons for any departure. Presumably the courts will reject an explanation unless it is reasonable.

#### G. *Agency Proceedings, in General*<sup>440</sup>

Evidence is admissible in agency proceedings in accordance with the "reasonably prudent person" test, but the reviewing court must still find "competent substantial evidence on the record." The final order must be rendered within a stated time limit, except in emergencies. The subpoena power is clarified, and a sanction is provided. The Act creates the right to a proceeding whenever substantial interests are affected. The proceeding is either formal or informal, depending on whether or not a disputed issue of material fact is involved.

#### H. *Formal Proceedings*<sup>441</sup>

Formal proceedings are conducted by a hearing officer assigned by the centralized pool, with some exceptions. Non-parties may participate in the hearing. The agency has only a limited right to overturn the hearing officer's findings of fact.

\* The Act does not mention a pre-hearing conference, nor does it explain how a threshold determination is made, in the event a party demands and the agency refuses a formal proceeding.

#### I. *Informal Proceedings*<sup>442</sup>

The Act guarantees an informal proceeding whenever substantial interests are affected and no disputed issue of material fact is involved. A proceeding which starts informally may be converted into a formal hearing if a material fact issue becomes apparent.

\* The Act should extend the opportunity for oral presentation so as to include argument as well as evidence.

\* Agency staff should be made available to assist persons preparing written presentations under the informal process.

\* Final agency action should include a statement of the rights of a party dissatisfied with such action.

\* The Act should clarify how threshold determinations are made

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439. See text accompanying notes 190-95 *supra*.

440. See text accompanying notes 196-243 *supra*.

441. See text accompanying notes 244-78 *supra*.

442. See text accompanying notes 279-88 *supra*.

regarding the right of a party to a formal proceeding, an informal proceeding or a "fair hearing," as his interests may require.

\* The Act should further provide the elements of a "fair hearing," and should indicate by whom it shall be conducted.

#### J. *Licensing*<sup>443</sup>

All licensing proceedings are governed by the formal or informal procedures of the Act. The agency must make prompt disposition, with a statement of its grounds. Expiration of licenses is delayed pending disposition of timely requests for renewal. Emergency suspension is provided.

#### K. *Hearing Officers*<sup>444</sup>

A centralized pool of hearing officers is established. These hearing officers generally conduct formal proceedings, with some exceptions. The pool may contract with any governmental entity to have hearings conducted by hearing officers of the pool, even where they are not required to do so by the APA.

#### L. *Ex Parte Communications*<sup>445</sup>

The Act prohibits ex parte communications to a hearing officer, and to an agency head after he has received a recommended order. If any such communication is made, the hearing officer shall place the communication, and any reply he made, on the record of the proceeding with notice to all parties. Sanctions are provided.

\* The Act should clarify whether the follow up required after receipt of an ex parte communication by an agency head is the same as that by a hearing officer.

#### M. *Judicial Review*<sup>446</sup>

The Act establishes a single form of action for judicial review in the district court of appeal. Pursuant to standards of review spelled out in the Act, the reviewing court shall deal separately with procedure, law, fact and policy.

The circuit courts retain their jurisdiction to render declaratory judgments, and to decide proceedings provided by other statutes in lieu of an administrative hearing.

\* The unique status of Industrial Relations Commission decisions, characterized by the supreme court as "judicial", requires legislative reconsideration.

\* Uncertainty surrounds the availability of prerogative writ actions.

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443. See text accompanying notes 289-312 *supra*.

444. See text accompanying notes 313-25 *supra*.

445. See text accompanying notes 326-45 *supra*.

446. See text accompanying notes 346-412 *supra*.

\* The Florida Appellate Rules require amendment, so as to implement the judicial review provisions of the APA.

N. *Enforcement of Agency Action*<sup>447</sup>

The agency or, in some circumstances, any substantially interested person may petition for judicial enforcement of agency action. Venue is in the circuit court. Multiple proceedings pending for enforcement and for judicial review may be consolidated by order of the district court of appeal. Parties lose the opportunity to raise certain types of defense if they challenge agency action by defending an enforcement suit, rather than by initiating a petition for review.

\* Consideration should be given to conferring enforcement jurisdiction upon the district court of appeal rather than the circuit court.

O. *Administrative Procedures Committee*<sup>448</sup>

The Act creates a joint legislative committee to review proposed agency rules and generally to review agency action and the operation of the APA.

P. *Miscellaneous Matters*<sup>449</sup>

All rules adopted without a public hearing before the effective date of the new Act shall become void no later than October 1, 1975. All rules shall be indexed by January 1, 1975, which is generally the effective date of the Act.

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447. See text accompanying notes 413-22 *supra*.

448. See text accompanying notes 423-25 *supra*.

449. See text accompanying notes 426-31 *supra*.